

THE FUTURE OF CANADIAN CARRIAGE  
OF GOODS BY WATER LAW

(A Study of the Hague Rules, the Hague/Visby  
Rules, and the Hamburg Rules on the Carriage  
of Goods by Sea.)


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DALHOUSIE OCEAN STUDIES PROGRAMME  
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The Dalhousie Ocean Studies Programme -- "New Directions in Ocean Law, Policy and Management" -- is a marine affairs research institute established in 1979. Initially funded for five years by the Social Sciences and Humanities Research Council of Canada, DOSP's objective is to establish itself as a permanent centre of excellence on ocean law, policy and management. The team for this study consisted of the following DOSP personnel.

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Terms of Reference for a Study to Review  
the Carriage of Goods by Water Act of Canada

1. To review the "Carriage of Goods by Water Act" to determine whether changes to the Act, if any, are required in view of current acceptance and status of the Hamburg Rules by some countries in lieu of the Hague Rules which, though never ratified by Canada, were adopted and appended to the Act as a "Schedule of Rules Relating to Bills of Lading".
2. To determine whether references to certain sections of the Canada Shipping Act presently contained in the Carriage of Goods by Water Act requires amendment in view of the fact that the Canada Shipping Act is in itself under review and will be replaced by the Maritime Code.
3. To determine whether reference to the Transportation of Dangerous Goods Act should be included in the Carriage of Goods by Water Act.
4. To determine the effect of any proposed changes as reflected in the Hamburg Rules on the Act as they relate to:
  - a) the effect of the change in scope of application;
  - b) the reduction of carriers exceptions;
  - c) the removal of exception for negligence in navigation;
  - d) the effect of presumed fault or neglect of carrier;



- e) the ability to pursue cargo claims at the port of destination;
- f) period of responsibility of carrier;
- g) the effect on carriers liability-period of liability, raising of limits of liability contract of carriage and carriage of goods by sea or bill of lading;
- h) the effect of carriers reservations clause.

The first four items of the terms of reference to be completed in their entirety. The balance of the work to be presented as an overview only.

5. To determine the effect of new rules on Canadian Transportation System in national and international context and the impact on existing commercial practices in Canada.
6. To determine the effect of implementation of the proposed new conventions on national and international competition for Canadian commerce and trade practices in Canada as well as upon U.S. trade implications.
7. To determine the attitude of major trading partners to the Hamburg Rules.
8. To recommend any changes/amendments that might be considered necessary to provide for any other contingencies that might arise.

## TABLE OF CONTENTS

Table of The Carriage Rules .....	xi
Preface and Acknowledgements .....	xv
I INTRODUCTION .....	1
II APPLICATION AND SCOPE OF THE RULES .....	5
A. To Whom The Rules Apply .....	5
1. Carriers .....	6
2. Cargo Owners .....	12
3. Servants of Carriers .....	16
4. Independent Contractors .....	20
B. When The Rules Apply .....	24
1. Contracts of Carriage .....	26
2. Charterparties .....	33
3. Geographic Scope .....	36
4. Period of Responsibility .....	47
5. Through Carriage .....	58
C. To What The Rules Apply .....	69
1. Deck Cargo .....	71
2. Live Animals .....	80
3. Goods and Packaging .....	83
4. "Particular Goods" and the Coasting Trade .....	85
D. How The Rules Apply .....	90
1. Exclusive Code .....	90
2. Interaction with Other Laws .....	95
3. International Uniformity .....	101
III RESPONSIBILITIES OF CARRIERS .....	103
A. Bills of Lading .....	104
B. Seaworthiness of Ship .....	125
C. Care of Cargo .....	140
D. Exclusion of Liability .....	148
E. Deviation .....	178
F. Delay .....	184
G. Limitation of Liability .....	190

IV	RESPONSIBILITIES OF CARGO OWNERS .....	229
	A. Description of Cargo .....	230
	B. Dangerous Goods .....	236
	C. Exclusion of Liability .....	242
V	CLAIMS AND ACTIONS .....	245
	A. Notice of Loss .....	246
	B. Limitation of Actions .....	251
	C. Jurisdiction .....	256
	D. Arbitration .....	261
	E. General Average .....	265
VI	GENERAL OVERVIEW OF COMMERCIAL ASPECTS OF ADOPTING THE HAGUE/VISBY RULES OR THE HAMBURG RULES .....	269
VII	SUMMATION OF LEGAL IMPACTS OF ADOPTING THE HAGUE/VISBY RULES OR THE HAMBURG RULES .....	299
VIII	CONCLUSION: THE CHOICE OF FUTURE WATER CARRIAGE LAW .....	323
	APPENDICES .....	327
	Appendix A: United Nations Convention on International Multimodal Transport of Goods .....	329
	Appendix B: Carriage Under Waybills .....	333
	Appendix C: Constitutional Jurisdiction Over the Water Carriage of Goods .....	351
	Appendix D: Delivery Provisions of the Canada Shipping Act .....	353
	Appendix E: Table of Limits of Liability Under The Rules .....	362
	Appendix F: Comparative Table of Limits of Liability by Country .....	363
	Appendix G: Comparative Survey of National Attitudes to the Choice of Rules .....	371
	SELECTED BIBLIOGRAPHY .....	387

# TABLE OF THE CARRIAGE RULES

## Carriage of Goods by Water Act:

Section	Section of Report
2	II.B.3
3	III.B
4	II.B.3
5	II.C.4
6	III.A and IV.A
7(1)	II.D.2, III.G and IV.B

## Hague Rules:

Article	Section of Report
I(a)	II.A.1
I(b)	II.B.1 and 2
I(c)	II.C.1, 2 and 3
I(d)	III.B
I(e)	II.B.4
II	III.C
III(1)	III.B
III(2)	III.C
III(3)	III.A
III(4)	III.A
III(5)	IV.A
III(6), para. 1, 2, 4	V.A
III(6), para. 3	V.B
III(7)	III.A
III(8)	II.D.1
IV(1)	III.B
IV(2)	III.D
IV(3)	IV.C
IV(4)	III.E
IV(5)	III.G
IV(6)	IV.B
V, para. 1	II.D.1
V, para. 2	II.B.2 and V.E
VI	II.C.4
VII	II.B.4
VIII	II.D.2 and III.G
IX	III.G
X	II.B.3

## Hague/Visby Rules (amended articles only):

Article	Section of the Report
III(4)	III.A
III(6), para. 4	V.B
III <u>bis</u> (6)	V.B
IV(5)	III.G
IV <u>bis</u> (1)	III.G
IV <u>bis</u> (2)	II.A.3, 4 and III.G

IV bis (3)  
IV bis (4)  
IX  
X

III.G  
III.G  
II.D.2  
II.B.3

Hamburg Rules:

Article

1(1)  
1(2)  
1(3)  
1(4)  
1(5)  
1(6)  
1(7)  
1(8)  
2(1)  
2(2)  
2(3)  
2(4)  
3  
4  
5(1)  
5(2)  
5(3)  
5(4)  
5(5)  
5(6)  
5(7)  
6(1) (a) (c)  
6(1) (b)  
6(2) - (4)  
7(1)  
7(2)  
7(3)  
8  
9  
10  
11  
12  
13  
14  
15(1) (a)  
15(1) (b) - (o)  
15(2) - (3)  
16  
17  
18  
19(1) - (4)  
19(5)  
19(6) - (8)  
20  
21  
22

Section of Report

II.A.1  
II.A.1  
II.A.2  
II.A.2  
II.C.2 and 3  
II.B.1  
II.B.1 and III.A  
II.B.1  
II.B.3  
II.B.3  
II.B.2  
II.B.1  
II.D.3  
II.B.4  
III.B, C and D  
III.F  
III.F  
III.D  
II.C.2  
III.E  
III.D  
III.G  
III.F and G  
III.G  
III.G  
III.A.3, 4 and III.G  
III.G  
III.G  
II.C.1  
II.B.5  
II.B.5  
IV.C  
IV.B  
III.A  
III.A and IV.B  
III.A  
III.A  
III.A  
IV.A  
II.B.1  
V.A  
III.F and V.A  
V.A  
V.B  
V.C  
V.D



Hamburg Rules (Cont'd)

23

24

25

26

II.D.1

V.E

II.D.2

III.G



## Preface and Acknowledgements

This report is a comparative review of the Carriage of Goods by Water Act, which gives effect to the Hague Rules on ocean carriage. The principal purpose in undertaking the review was to provide a comprehensive legal analysis of the operative effects of the Act. A secondary function was to state a brief overview of its commercial impacts. These objectives were pursued by comparing the Hague Rules, as found in the Act, with the Hague/Visby Rules, 1968 and the Hamburg Rules, 1978 with a view to assessing the choice of water carriage law now before Canada.

Consequently the bulk of the report is a legal study of the carriage Rules. In this portion of the report the discussion proceeds from rule to rule. At the head of each section first the relevant Hague Rules and then the comparable Hague/Visby and Hamburg Rules are set out prior to analysis. The actual order of the report does not follow the numbered sequence of the Hague Rules, but is organized according to the subject matter.

To make this technical material accessible to a wide range of readers, each section of the report has been written in three parts. Immediately after the particular Rules set out for consideration is a "summary" in plain language of the "legal commentary" that follows it. Finally "references" are collected after the "legal commentary" by paragraph.

Consequently, it is possible to read each section of the legal analysis of the Rules at any one of three levels of increasing detail. Equally, one can choose to read the whole of the legal study in the report at one level, passing, say, from "summary" to "summary" without fear of missing its essential points and conclusions.

The remainder of the report sums up the commercial and the legal impacts involved in the choice of Rules by Canada. There follow several appendices on matters of Canadian law related to ocean carriage, or on comparisons of other states' reactions to the alternative Rules.

The authors would like to thank the DOSP administrative staff for the typing and production of this work, in particular, Kathleen Sawler, Lynda Corkum, and Helen Foster. The authors would also like to thank J. Graham Day, Esq. for his comments prior to his departure as Director of the Canadian Marine Transportation Centre.

CHAPTER I    INTRODUCTION: THE INTERNATIONAL RULES OF WATER  
CARRIAGE

Damage to cargo is a foreseeable occurrence in international sea carriage. It results in unwanted loss and expense to all participants in the shipping industry. Carriers and cargo owners both try to avoid the burden of absorbing these costs, either directly or through insurance. Canadian law originally made the common carriers of cargo virtual insurers of the goods in their charge. They were held responsible for any loss or damage to cargo, with very few excuses from liability. However, the law also respects the freedom of contract. Carriers took advantage of this principle to make arrangements with cargo owners that relieved them of the severity of responsibility otherwise cast upon them. They exercised their contractual power very effectively to exempt themselves most generously.

In 1924 the Hague Rules were completed in an attempt to establish a balance of commercial risks and legal responsibilities between the carriers and the cargo owners. These international rules were designed to provide a definite measure of protection to the cargo owners, in return for a limitation of liability for the carriers. The Hague Rules were incorporated into the Canadian Carriage of Goods by Water Act of 1936. Canada has never acceded to the Brussels Convention, which established the Hague Rules.



Since that time, changes in vessel design and communication technology, together with economic trends, have created pressures for reforms of the Hague Rules. In 1968 a set of amendments in the form of the Visby Protocol were agreed internationally to take into consideration some of these changes. The revised Hague/Visby Rules have been adopted by Great Britain, France and several other countries.

The Visby Protocol did not readdress the fundamental question of risk allocation. To many the Hague Rules appear to favour the carriers unduly as they are made to operate under current conditions. Pressure for a complete review of international sea carriage law arose in the Shipping Division of the United Nations Conference on Trade and Development (UNCTAD). The Hague Rules were then seen to be outdated and supportive of an international economic system that was detrimental to developing nations, who were generally shipper, not carrier, oriented. After the foundations for the new Rules were set by UNCTAD, the preparatory work was carried on by the United Nations Commission on International Trade Law (UNCITRAL). From this political background came the U.N. Convention on the Carriage of Goods by Sea, commonly known as the Hamburg Rules. They were completed in 1978.

The purpose of this study is to examine the legal differences between the Hamburg Rules and the Hague/Visby Rules, and to outline the commercial implications of adopting either set in place of the unrevised Hague Rules. The choice

is important because Canada is a major participant in ocean going international trade. Whatever the choice, Canada will continue to be affected by the other regimes so long as they are applied by other countries in their trade with Canada.

Chapters two through five compare in detail the legal aspects of the Hague, the Hague/Visby and the Hamburg Rules. Chapter six briefly surveys the potential commercial impacts of adopting the Hague/Visby or the Hamburg rules. Chapter seven summarises the legal findings, while chapter eight is a short concluding section that brings together the legal and commercial recommendations of this report.



## CHAPTER II APPLICATION AND SCOPE OF THE RULES

The International Rules of water carriage do not apply to all sea transportation. Before a study can be made of their legal effects, precise note of their scope must be taken. This chapter investigates the reach of the Rules. There are four pertinent aspects to their application and scope, which will be addressed in the following sections:

- A. To whom the Rules apply
- B. When the Rules apply
- C. To what the Rules apply
- D. How the Rules apply

### A. TO WHOM THE RULES APPLY

The Rules are concerned with four kinds of persons involved in the water carriage of goods. They are: 1) carriers, including shipowners and ship charterers; 2) cargo owners, whether shippers or consignees; 3) servants of carriers either as employees or as agents, both on board and ashore; and 4) independent contractors such as stevedores, terminal operators and wharfage companies. Each of these classes of participants in the carriage of goods is considered in turn.

## 1. Carriers

### Hague Rules: Article I (a)

"carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

### Hamburg Rules: Article 1(1),(2)

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.
2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

### Summary

The Hague Rules treat the person who enters into a contract of carriage with the shipper as the carrier. The party may be the shipowner, the charterer, and even on occasion a freight forwarder or any other ship's agent. Implicitly, the contracting carrier is not necessarily the actual carrier. In practice the shipowner is most commonly the contracting carrier because the person signing the bill of lading, which contains the contract of carriage, acts as agent for the master on behalf of the ship.

Exceptions exist. Under a bare boat charter, the charterer stands in place of the shipowner. Pursuant to a voyage or time charterparty, the charterer usually undertakes some of the duties of a carrier and thus, in effect, may incur joint responsibility with the shipowner.



Often a charterer will add a "demise clause" to the bill of lading in an effort to exempt itself from cargo liability. Shipowners exercise liberty clauses to transship goods to other carriers. The uncertain effect of all these variations has made it difficult and expensive for the cargo owner to determine whom he should pursue for redress.

The Hamburg Rules explicitly distinguish the contracting carrier from the actual carrier and deliberately make the former responsible in principle for performance of the whole carriage. Moreover, they require the name of the carrier to be included in the bill of lading. By these means, the difficulties in identifying the responsible carrier will be greatly reduced.

#### Legal Commentary

1. The Hague Rules were designed to apply to cargo owners (either shippers or consignees as the situation suggests) and carriers of the cargo. Article I(a) defines one of the parties over which the Rules are to exercise some control. For the purpose of the Rules the carrier is the one who enters into the contract of carriage with the shipper. The contract of carriage under the Hague Rules is usually in the form of a bill of lading.

2. Article I(a) states that the carrier includes the owner or the charterer, but is not so restricted. The carrier might be a freight agent, forwarding agent, or carriage contractor, but the term does not include stevedores. Clearly

the carrier defined in the Hague Rules is the contractual carrier and not necessarily the actual carrier. However, the use of "carrier" in the substantive articles, e.g., Articles III (1) (a) and IV (2), would seem to indicate that it is often synonymous with shipowner.

3. The shipowner is commonly the defined carrier under the Hague Rules since the master of the ship who signs the bill of lading is usually an agent for the shipowner and, therefore, binds him. Even where a charterer signs the bill of lading for the master, the shipowner is still bound since the master under most voyage and time charter parties remains his employee or agent. Where the charterer issues and signs his own bill of lading then he is the carrier. In cases where the charter is by demise, that is for a bare boat, the master binds the charterer and not the shipowner.

4. Problems have arisen in identifying the carrier under the Hague Rules where a demise, or identity of carrier, clause is included in the contract of carriage. The original purpose of the demise clause was to ensure that cargo liabilities would be subject to the rules of limitation enjoyed by the shipowner. The typical demise clause currently states that the charterer is a mere agent in making the contract of carriage and that therefore it has no liability as a carrier. Charterers have used the demise clause to avoid liability for cargo shipped under a bill of lading. This type of clause is unnecessary when the charterer is not the carrier. When it is, the claim has been rejected in Canada on the basis that such a

demise clause purports to relieve the carrier from liability under the Hague Rules, which is forbidden by Article III (8).

5. Where the charterer shares responsibility for carriage with the shipowner, it may be considered the carrier jointly and therefore liable upon the bill of lading. The time or voyage charterer is usually responsible for loading, stowing, and discharging, which are duties of the carrier under Article II of the Hague Rules, and thus performs the carrier's obligations. Carriage is really a joint venture between charterers and owners, as evidenced by the charterparty, and thus the definition of carrier in the Hague Rules should be interpreted to permit recovery from both the charterer and the shipowner.

6. The uncertain identity of the carrier under the Hague Rules leaves the cargo owner unable to determine who is the proper party from whom to seek redress. The difficulty was taken up by the drafters of the Hamburg Rules. Prior to consideration of the definition of "carrier" at UNCITRAL, the decision had been made that the contracting carrier would be responsible for actual carriage. Moreover, it had been decided that the new Hamburg Rules would apply, not just to bills of lading as do the Hague Rules, but to all contracts for the carriage of goods by sea. The working group sought to establish definitions for the contractual carrier and the actual carrier, bearing in mind the need for new transshipment provisions. The definitional articles, it was hoped, would solve some of the problems of transshipment. When this was not

successful the "Drafting Party sought solutions which would give rise to the maximum amount of support because of vagueness."

7. The Hamburg Rules define the carrier as whoever contracts with the shipper, and the actual carrier as anyone to whom performance of the carriage is entrusted by the carrier. Consequently, cargo owners will now know who to sue and the demise clause becomes unimportant. One of the requirements under Article 15 (1) for inclusion in the bill of lading is the name of the carrier.

8. Canada's commentary on the Draft Convention indicated that, although the Hague Rules Article 1 (a) was "not perceived to have given rise to difficulty or uncertainty", the new definition of the carrier is an improvement. The definition of the actual carrier was criticized by Canada because it created unnecessary rigidity in commercial practice. Canada suggested the problem should be left to the multimodal transport convention or remain a problem for national law.

9. The definitions in the Hamburg Rules have not yet completely eradicated the problem of identifying the carrier and leaves uncertain what is meant by "performance of the carriage", but on the whole cargo owners should have an easier task determining from whom to recover losses.

#### References

Para. 2. As to who might be included as a carrier under Article 1 (a), see Scrutton on Charter Parties and Bills of Lading (18th ed.) (London, Sweet and Maxwell, 1974), p.415 (hereinafter referred to as Scrutton, (18th ed.)). Concerning

the use of "carrier" in the Hague Rules see Samir Mankabady, "Comments on the Hamburg Rules", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), p.35 (hereinafter S. Mankabady, "Comments").

Para. 3. In Paterson Steamship Ltd. v. Aluminum Co. [1951] S.C.R. 852 and (1951), 1 D.L.R. 241 the Supreme Court held the shipowner liable for the cargo loss where the bill of lading was signed and issued by agents for the master that were appointed by the charterers. The decision has recently been confirmed: Avis Steamship Co. Inc. v. Associated Metals and Minerals Corp. et al. (1980), 110 D.L.R. (3d) 1 (S.C.C.).

Para. 4. On the demise clause generally see William Tetley, Marine Cargo Claims (2d ed.) (Toronto, Butterworths, 1978), at pp. 88-96 (hereinafter referred to as Tetley) and Peter Jones, "Demise Clauses in Bills of Lading", in Edgar Gold, ed., New Directions in Maritime Law 1976 (Halifax, Dalhousie Continuing Legal Education Series, No.12, 1976), pp. 81-94. For the Canadian decision voiding the demise clause, see Canadian Klockner Ltd. v. D/S A/S Flint (The Mica), [1973] 2 Lloyd's Rep. 478, at pp. 483-484, [1973] F.C. 988 (Fed. Ct. T.D.), on appeal [1975] 2 Lloyd's Rep. 371.

Para. 5. This argument is referred to by Tetley, pp. 85-86.

Para. 6. The work of UNCITRAL as it relates to the definition of "carrier" is discussed in Joseph C. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)" (1976), 7 J. of Maritime L. and Comm. 615, at pp. 629-631.

Para. 8. Canada's comments on the UNCITRAL Draft Convention can be found in United Nations Commission on International Trade Law Yearbook, Vol. V, 1974, pp. 204-211 (hereinafter referred to as UNCITRAL Ybk.).

Para. 9. A discussion of the problems with the Hamburg Rules definition of "carrier" can be found in Jan Ramberg, "The Vanishing Bill of Lading and the 'Hamburg Rules Carrier'" (1979), 27 Am. J. of Comp. L. 391, at pp.394-403.

## 2. Cargo Owners

### Hamburg Rules: Article 1(3), (4)

3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.
4. "Consignee" means the person entitled to take delivery of the goods.

### Summary

The range of cargo owners is undefined by the Hague Rules but by implication and practice clearly includes the shipper, who is a party to the contract of carriage with the carrier, and other persons with an interest in the cargo according to national law. In Canada the Bills of Lading Acts extend the rights of the shipper to the consignee and any endorsees, such as a buyer of the goods against their documents.

The Hamburg Rules expressly define "shipper" and "consignee" largely in accordance with experience under the Hague Rules and hence they will not cause major changes. However, the Canadian Bills of Lading legislation will need amendment to encompass the commercial expectations of consignees and endorsees of documents of title other than bills of lading to which the Hamburg Rules will apply.



## Legal Commentary

1. The Hague Rules are silent as to who may use them to sue the carrier for loss, damage or delay to the goods. Certainly the shipper would have a right to do so since he is a party to the contract of carriage. The consignee or an endorsee for value of the bill of lading may sue because, by the Canadian Bills of Lading Act section 2, he is vested with the same rights as the shipper. Once the property and title in the goods has been transferred by the shipper, he will usually lose his right to sue since he no longer has any proprietary interest in the cargo, unless he has suffered some related loss. Whether other parties with an interest may use the Hague Rules in a suit against the carrier depends upon local national law.

2. The Hamburg Rules have defined both "shipper" and "consignee," but the definition of "shipper" has been said to provide nothing new and, therefore, to be somewhat superfluous. Indeed, the definition may cause problems since the shipper can be either the party to the contract of carriage or the person who delivers the goods to the carrier.

3. The only inference to a consignee in the Hague Rules is found in Article III (6) which refers to the person entitled to take delivery of the goods. This is the wording used by the Hamburg Rules to define the consignee. It appears from this definition that a consignee may exist regardless of the absence of a bill of lading. The Hamburg Rules lack a clause explaining the legal relationship between the consignee and the carrier. The Hague Rules did not need one since the position



of a consignee under a bill of lading appears clear. Since the Hamburg Rules apply to documents other than bills of lading, a clause on the legal relationship thereby created would be useful.

4. Apart from these points, the terms "shipper" and "consignee" in the Hamburg Rules do not appear to have been expanded beyond their existence under the Hague Rules. However, in the Canadian context, the relationship between the consignee and the carrier, where the document in use is not a bill of lading, will be uncertain. At Common Law contracts are not assignable. The owner of goods might endorse and deliver his document of title thus passing all his proprietary interest to the endorsee, but he could not transfer any of the dependent contractual rights and liabilities, including rights of action. This ancient obstacle of the Common Law was overcome in cases of carriage by the enactment of the bills of lading legislation. These acts, however, refer specifically to bills of lading, being the only documents of title then in commercial use. Whether the courts will stretch the legislation to cover the endorsement of other kinds of documents of title used under the Hamburg Rules seems unlikely. If not, consignees may find themselves prejudiced by the Common Law principle unless the bills of lading legislation is amended to widen its application.

#### References

Para. 1. For a general discussion on who may sue the carrier

under the Hague Rules, see Tetley, at pp. 59-70. The Provinces have enacted facsimile legislation to the Canadian Bills of Lading Act, which may be found at R.S.C. 1970, c.B-6. The effects of transferring proprietary interest in the cargo is discussed fully in The Albazero, [1976] 3 All E.R. 129 (H. of L.).

Para. 2. In a cataloguing of the Hamburg Rules Tetley, "The Hamburg Rules -- A Commentary" (1979) Lloyd's Maritime Law and Comm. Q. 1, at p.15, suggests that the definition of shipper and consignee add nothing new.

Para. 3. The problem of the legal relationship between the consignee and carrier were expressed by several representatives in the Report of the Work Group (Seventh Session), UNCITRAL Ybk., Vol. VI, 1975, at p.201.

Para. 4. The effect of the Bills of Lading Acts is explained in para.1. They are treated by Payne and Ivamy's Carriage of Goods by Sea (11th ed.) (London, Butterworth's, 1979), at pp. 99-107 and by Scrutton, (18th. ed.), at pp. 26-28.

### 3. Servants of Carriers

#### Hague/Visby Rules: Article 4 bis (2)

If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

#### Hamburg Rules: Article 7 (2)

If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

#### Summary

Servants and agents are not defined by the Rules but evidently include masters and crew members as well as employees and ships' brokers and agents ashore. The carrier is vicariously responsible for their acts, for which he may limit his liability.

Under the Hague Rules it is uncertain whether the carrier's employees can similarly limit their liability when sued personally. Often a so-called Himalaya clause is included in the bill of lading to afford this protection but its effect is equally uncertain. The Hamburg Rules follow the Hague/Visby Rules in expressly availing a servant or agent, when acting within the scope of his employment, with the carrier's defences. The new provision is a great improvement but it may incidentally encourage litigation to distinguish, according to

Canadian law, an employee, who may be able to seek protection from the Rules, and an independent contractor, who will not.

### Legal Commentary

1. The Hague Rules refer to servants and agents of the carrier but they do not define their status. Whether a person is a servant or agent is determined by national law. When an individual is a servant or an agent, the carrier is vicariously responsible for his acts.

2. The chief difficulty about servants and agents is whether they can rely on the limitation of liability provisions in the Hague Rules. The problem arises when actions in negligence are brought directly against servants or agents of the carrier for loss or damage to the cargo. Most bills of lading attempt to avoid this problem through the use of a "Himalaya clause", whose purpose is to extend to the servants, agents, stevedores and independent contractors of the carrier, his protection under the Hague Rules. The problem of stevedores and independent contractors is somewhat different than servants or agents and is dealt with in the next section.

3. The Himalaya clause has been often tested in Anglo-Canadian courts but the party involved was always a stevedore. The cases are not uniform in permitting stevedores to benefit from the Hague Rules, but recent British judgements have allowed them to do so. The leading Canadian case rejects the Himalaya clause, but subsequent cases have not always followed it. In spite of the uncertainty, it appears that the

Himalaya clause could be successfully used by a servant or agent of the carrier to restrict liability, provided the misfeasance took place during the period when the carrier was responsible to the cargo owner under the Hague Rules.

4. Article 4 bis (2) of the Hague/Visby Rules clarifies the situation considerably by extending the defences and limits of liability to the servants and agents of the carrier during the period of time in which the Hague Rules govern the contract of carriage. The aim of this provision is to protect masters and members of the crew, direct employees and those who, although self-employed or employed by others, act on behalf of the carrier. It would not prevent a carrier from additionally inserting a Himalaya clause for the protection of independent contractors. Impliedly, the servant or agent of the carrier must be acting in the course of his employment to benefit from Article 4 bis (2).

5. The Hamburg Rules adopt the Hague/Visby Rules' approach to servants and agents, deleting the clause on stevedores, and adding an explicit reference to proof by the benefiting employee that he was acting in the scope of his employment. Theft is not considered within the scope of a servant or agent's employment. The approach taken by both the Hague/Visby and the Hamburg Rules does much to resolve the plight of servants and agents. Since their responsibility for the cargo will now clearly be coextensive with the carrier, there will be no advantage to suing them personally. Since the Hamburg Rules do not define "servant" and "agent", however,

Canadian law will continue to distinguish between an employee and an independent contractor. Unfortunately the uncertain status of independent contractors, (see the next section), may encourage litigious claims to protection as a servant or an agent.

## References

Para. 3. The major British case in favour of the stevedores is (The Eurymedon) New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. [1974] 1 Lloyd's Rep. 534 (H. of L.). This case was recently considered in Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. (The New York Star) [1980] 2 Lloyd's Rep. 317 (H. of L.). The leading Canadian case is (The Lake Bosomtwe) Canadian General Electric Co. Ltd. v. Pickford and Black [1971] S.C.R. 41; [1971] 2 Lloyd's Rep. 343; 20 D.L.R. (3d) 432 (S.C.C.). The lower courts have not universally followed this decision. It is the conclusion of Tetley, at p. 96, that the servant or agent would be protected by the Hague Rules. The opposite conclusion is reached in Carver's Carriage By Sea, Vol. II (12th ed.) (London, Stevens & Sons, 1971), at para. 1482 (hereinafter referred to as Carrier, (12th ed.)), but this was written prior to The Eurymedon decision cited above. The report of the United Nations Secretary-General to UNCITRAL is equally uncertain as to the effects of the Hague Rules on servants and agents, see Second Report of the Secretary-General, UNCITRAL Ybk. Vol. IV, 1973, at p. 169. Note should also be taken of the comments in S. Mankabady, "Comments", at p.65.

Para. 4. General comments on the Hague/Visby Rules Article IV bis (2) can be found in Tetley p. 387 and W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p.216. A more detailed discussion can be located in Anthony Diamond, "The Hague - Visby Rules" (1978) Lloyd's Maritime and Commercial Law Quarterly 225, at pp.249-253.

Para. 5. Reference can be made to S. Mankabady, "Comments", at p. 71, Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part Two)" (1976), 7 J. of Maritime L. and Comm. 372, at p.34 and Kurt Gronfors, "Non-Contractual Claims under the Hamburg Rules", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp.187-195.



#### 4. Independent Contractors

##### Hague/Visby Rules: Article 4 bis (2)

If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

##### Hamburg Rules: Article 7 (2)

If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

##### Summary

Independent contractors, such as stevedoring companies, are distinguished from servants and agents in not being employees of the carrier. They are not mentioned by the Hague Rules and the extent of their liability in Canadian law is unsettled. Attempts to use a Himalaya clause so as to provide stevedores with the carrier's defences under the Hague Rules and the bill of lading have met with very mixed judicial reactions.

Although the Hague/Visby and the Hamburg Rules clarify the position of servants and agents, they do not help illuminate the status of independent contractors. Thus, the position of stevedores will remain to be resolved by Canadian law.



## Legal Commentary

1. The position of independent contractors, such as stevedores, is obscure. They are not mentioned by the Hague Rules. The effect of a Himalaya clause inserted in a contract of carriage for their benefit is far from settled in Canadian jurisprudence. Stevedores, as independent contractors, seek to use the Himalaya clause to limit or exclude their liability whether arising under the Hague Rules or not. In many cases the activity of the stevedore takes place either before or after the time period during which the Hague Rules have effect, (considered to be from tackle-to-tackle). As independent contractors, stevedores have been considered third parties to agreements for carriage and, therefore, unable to benefit from the provisions contained in them for lack of privity of contract. At present the leading Canadian case supports this line of reasoning.

2. In the past few years English cases have supported the stevedores in their attempts to benefit from the Himalaya clause. It has been declared that a bill of lading, including a Himalaya clause, brought into existence a unilateral bargain which became a full contract when the stevedores moved the cargo. Their acts for the benefit of the shipper were their consideration for his agreement that they, in turn, should have the benefit of the limitation provisions of the bill of lading. The English court decisions that support this approach are based on tortious considerations of legal principles. The Canadian cases are even less clear. Under Canadian law gross negligence on the part of a stevedore will place him beyond the

protection of the Himalaya clause, although the cases that have taken this approach have been doubted because of their civil law origin. A recent Canadian case supported the professional cargo handlers' use of the Himalaya clause, citing the recent British cases and the clear intention of the contracting parties that the cargo handlers should be able to take advantage of the limitations and defences afforded to the carrier.

3. Under Article 4 bis (2) of the Hague/Visby Rules, the defences and limitations available to the carrier are also made available to servants or agents, but expressly not to independent contractors. Thus in most cases stevedores will be excluded. At the time of the drafting of the Hague/Visby Rules, Article 4 bis (2) reflected British common law, although it may not have been intended to exclude all independent contractors.

4. Article 7 (2) of the Hamburg Rules deletes the reference to independent contractors contained in the Hague/Visby Rules and thus leaves open the question who is to be considered a servant or agent of the carrier. In a commentary on Article 7 by the UNCTAD Secretariat it is stated that the article "would permit servants, agents or independent carriers" who have been sued in tort to take advantage of the limitations in the Hamburg Rules. In the end result, under both the Hague/Visby and the Hamburg Rules, the position of the stevedore and the Himalaya clause is still a question of national law, and that law is unclear in Canada.

## References

Para. 1. The classic case on privity of contract as it relates to stevedores and the Himalaya clause is Midland Silicones v. Scruttons [1961] 2 Lloyd's Rep. 365; [1962] A.C. 446; [1962] 2 W.L.R. 186; [1962] 1 All E.R. 1 (H. of L.). The leading Canadian case is (The Lake Bosomtwe) Candian General Electric Co, Ltd. v. Pickford and Black [1971] S.C.R. 41; [1971] 2 Lloyd's Rep. 343; 20 D.L.R. (3d) 432 (S.C.C.).

Para. 2. The leading British case is (The Eurymedon) New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. [1974] 1 Lloyd's Rep. 534 (H. of L.) and see the comments of Lord Wilberforce in Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. (The New York Star) [1980] 2 Lloyd's Rep. 317, at p.371 (Pr.Co.). The Eurymedon decision is criticized by Tetley, at pp.382-383. The Canadian gross negligence cases are The Cleveland Canadian Shipping Ltd. v. Eisen und Metall A.G. and Ceres Stevedoring Co. Ltd. [1977] 1 Lloyd's Rep. 665 (Que. C.A.) and The Federal Schelde [1978] 1 Lloyd's Rep. 285. See also Circle Sales and Import Limited v. The Tarantel [1978] 1 F.C. 269 (Fed. Ct. T.D.). For comments on the Canadian cases, see Tetley, at pp. 383-386 and Tetley, "The Himalaya Clause, 'stipulation pour autrui' Non-Responsibility Clauses and Gross Negligence under the Civil Code" (1979), 20 Les Cahiers de Droit 449-483. The most recent Canadian case is Marubeni America Corp. v. Mitsui O.S.K. Lines Ltd. and International Terminal Operators Ltd. [1979] 2 F.C. 283, see pp. 296-302 (Fed. Ct. T.D.), renamed Miida Electronics. Inc. v. Mitsui O.S.K. Lines Ltd. (1981), 124 D.L.R. (3d) 33 (Fed. Ct. A.D.), in particular the judgement of LeDain, J.

Para. 3. Whether the drafters of the Hague/Visby Rules intended to exclude all independent contractors or not appears to be a question involving an examination of the French text. This is alluded to by Tetley, p. 387; and Anthony Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial Law Quarterly 225, at pp.250-251.

Para. 4. The UNCTAD Secretariat comments are found in "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Doc. TD/B/C.4/ISL/19, 30 October 1975, at p.29. S. Mankabady in "Comments", at p. 70 states that: "stevedores will not benefit from Article 7 when they are considered as independent contractors."

## B. WHEN THE RULES APPLY

### Introduction

Since the Rules regulate the responsibilities of carriers and cargo owners, they may be expected to apply whenever an agreement for the carriage of goods is made. In principle, they do apply to all contracts of international carriage, but with significant exceptions.

The documentary form of carriage agreements most commonly used in commerce is the bill of lading. For this practical reason, the Hague Rules are made to apply to all contracts of carriage covered by the bill of lading. As a basis for applying the Rules, this approach has proved very limiting. Consequently, a way has been found in the Hamburg Rules to extend their documentary scope to all forms of carriage contracts without prejudicing the commercial and legal importance of bills of lading. To these principles, charterparties always were, and will remain, an exception.

Although the Rules may be expressed as applying to contracts of carriage, they cannot do so unless invoked by the parties or implemented by legislation of nation states. International agreement is not enough to give the Rules the force of law at a national level. Consequently, there are severe geographic limitations on when the Rules will apply to a particular carriage contract depending whether all or any of the countries involved do enforce one or other of the sets of Rules. The Rules themselves contain principles that try to

overcome these geographic limits on their enforcement but they cannot prevent conflicts of application between the Hague, Hague/Visby, and the Hamburg Rules until one set is universally adopted.

A contract of carriage is usually made well in advance of its performance. The Rules establish the period of time for which the parties are responsible to each other under their contract. The Hague Rules use the well known "tackle to tackle" principle. A great volume of damage and disputes occur at the time of loading or of discharging and delivery and so the Hamburg Rules were drafted to extend additionally, though somewhat uncertainly, to the port-side aspects of water carriage. As technological advances have found increasing commercial application in multimodal transport, the Hamburg Rules also provide against the problems of transshipment that typically, but not exclusively, occur during through carriage.

These aspects are discussed in this section as follows:

1. Contracts of Carriage
2. Charterparties
3. Geographic Scope
4. Period of Responsibility
5. Through Carriage



## 1. Contracts of Carriage

### Hague Rules: Article I (b)

"contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

### Hamburg Rules: Article 1 (6), (7), (8)

6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention in so far as it relates to the carriage by sea.
7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.
8. "Writing" includes, inter alia, telegram and telex.

### Article 2 (4)

If a contract provides for future carriage of goods in a series of "shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply."

### Article 18

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be



carried, such a document is prima facie evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

### Summary

The Hague Rules apply to contracts of carriage covered by a bill of lading or a similar document of title. A bill of lading acts as a receipt for the goods by the carrier and a document of title of their owner, as well as good evidence of the carriage contract. Agreements for carriage supported by no documents or merely by receipts are outside the Rules, unless they are incorporated by express agreement.

Although the use of bills of lading is very common commercially, the scope of the Hague Rules is unnecessarily constricted by invoking them solely upon the issuance of a document of title. The courts have not been imaginative in recognizing documents similar to bills of lading but they have been liberal in applying the Rules where there was an intention to issue a bill of lading that was never fulfilled.

The Hamburg Rules will clear away these limitations by applying to all contracts of carriage. Whatever documents are issued will no longer affect whether the Rules will come into operation but they may be used in proof of the contract. Bills of lading, however, will still serve a critical function under the Hamburg Rules.

### Legal Commentary

1. The Hague Rules are applicable only where contracts

of carriage are covered by bills of lading or similar documents of title. It is therefore important to consider each of the three elements that circumscribe the contract of carriage: i) bills of lading; ii) similar documents of title; and iii) the meaning of "covered".

2. A bill of lading is not defined in the Hague Rules presumably because it was and is so well recognized. In Canadian jurisprudence, it is a three-fold document acting as a receipt, a document of title, and evidence of the contract of carriage. The key test as to whether a document is a bill of lading within the meaning of the Hague Rules is its transferability as a document of title. From the wording of Article I (b) it has been suggested that the bill of lading is by definition a document of title, but this may not be so where the bill of lading fixes the identity of the consignee. In such a case, the bill of lading is a "straight" or "non-negotiable" bill and may not be deemed a document of title.

3. The phrase "similar documents of title" was probably included in the Hague Rules to cover documents used in countries outside the influence of English practice that are very much like bills of lading. In English law "similar documents of title" have embraced a "received for shipment" bill of lading as described in Article III (3) of the Hague Rules, and would probably include a through bill of lading in so far as the document relates to sea carriage. While a mate's receipt is not a document of title, except in the event of a

local trade usage as such, a ship's delivery orders when issued by the carrier in place of a bill of lading, may be. Whatever the precise meaning of "similar documents of title", the conclusion has been drawn that it has not been used creatively enough to cover modern means for evidencing the contract of carriage.

4. In British and Canadian jurisprudence the Hague Rules come into effect whether or not the contract of carriage is actually "covered" by a bill of lading provided there was the intention to issue one. In the leading Canadian case, the bill of lading was prepared but never issued. The court held that, since it was the regular practice known to both parties for a bill of lading to be issued, the Hague Rules applied. In a more recent case, both parties were aware that the bill of lading was prepared after the vessel was underway. The loss occurred immediately after loading and the bill of lading was issued, unsigned but with the carrier's imprint, a month later. The court held that the bill of lading was valid and, since there was intent to issue it all along, the Hague Rules applied.

5. The makers of the Hamburg Rules had to choose between two alternative approaches in determining the documentary scope of the new rules. The first choice, which was not accepted, was to list all the possible documents that might be used for contracts of carriage. The second option, which was adopted in Article 2, was to make the Hamburg Rules apply to all forms of contracts of carriage, relying on the

documents issued merely as evidence of the existence and the terms of the agreement. The new definition of a "contract of carriage by sea" is borrowed from other transport conventions, in that a contract exists when the carrier undertakes to carry the goods against payment of freight. The proviso, that the Hamburg Rules apply only to the seaward part of carriage, indicates that the drafters were aware of the work being done on the International Multimodal Transport of Goods Convention. The definition is broad enough to encompass a contract for a series of shipments. Article 2 (4) confirms that in such a case the Hamburg Rules will apply to each shipment. Canadian comments on the UNCITRAL Draft desired the contract of carriage to be defined in terms of "a contract evidenced by a bill of lading", indicating a wish to maintain the bill of lading as the major document. Had this Canadian proposal been accepted the documentary scope of the Hamburg Rules would have been little changed from the Hague Rules.

6. The emphasis on bills of lading to define the documentary scope of the Hague Rules is removed from the Hamburg Rules without affecting their common use. Under the Hamburg Rules, bills of lading will become merely one means to prove the contract of carriage. By Article 18 any receipt of the carrier for the goods is equally good evidence of a contract of carriage. The desire, however, to establish special rules to govern the contents and legal effects of bills of lading gave rise to the need for their definition in the Hamburg Rules. The language used in Article 1 (7) perpetuates

the traditional three-fold character of a bill of lading. The document must evidence the contract, must acknowledge receipt or loading of the cargo, and must oblige the carrier to deliver the goods upon its surrender by the holder, implicitly, as his proof of title. Article 1 (7) clarifies the uncertainty under the Hague Rules surrounding the element of title by including both straight and negotiable bills of lading.

7. As a result of broad judicial interpretation, the documentary scope of the Hague Rules has not created many difficulties in Canada. The Hamburg Rules, however, are undoubtedly more straightforward and inclusive. Their reference throughout to contracts of carriage by sea might, out of caution, be adapted, as the Hague Rules were by COGWA, to extend to transport by water so as to be sure to include international traffic on the Great Lakes.

#### References

Para. 2. In Canadian General Electric Co. v. Les Armateurs du Saint Laurent Inc. [1977] 1 F.C. (Fed. Ct. T.D.) the court was presented with the question of whether the unsigned document before it was a bill of lading. The Trial Judge focused attention on the lack of signature, but in conclusion signified that the document was a mere receipt and not a negotiable bill. On the problem of transferable and negotiable bills, see Carver (12th ed.), at para.251. Tetley, at p.6, argues that Article 1 (b) provides that a bill of lading must be a document of title. This proposition is doubted in Third Report of the Secretary-General, UNICTRAL Ybk., Vol. V, 1974, at pp.157-158. It should be noted that bills of lading are not defined in the Canadian Bills of Lading Act, R.S.C. 1970, c.B-6.

Para. 3. The comments in this paragraph are based on Carver, (12th ed.), at paras.251 and 252. As to delivery orders, see Cremer v. General Carriers S.A. [1974] 1 All E.R. 1 (Q.B.). The conclusion reached was expressed in the Third Report of the

Secretary- General, UNCITRAL Ybk., Vol.V, 1974, at p.158.

Para. 4. The leading Canadian case is Anticosti Shipping Co. v. St. Amand (1959), 19 D.L.R. (2d) 472; [1959] S.C.R. 372; [1959] 1 Lloyd's Rep. 352 (S.C.C.), which followed the leading English case Pyrenne Co. v. Scindia Navigation Co., [1952] Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158; [1954] 1 Lloyd's Rep. 321 (Q.B. Div.). Anticosti Shipping was followed by the Supreme Court of Canada in Falconbridge Nickel v. Chimo Shipping (1973), 37 D.L.R. (3d) 545; [1973] 2 Lloyd's Rep. 469; [1974] S.C.R. 933. The recent case is A.R. Kitson Trucking Ltd. v. Rivotow Straits Ltd. [1975] 4 W.W.R. 1 (B.C.S.C.).

Para. 5. The alternatives are presented in the Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at pp.160-161. The general acceptance of the Hamburg Rules drafters is noted in Report of the Working Group (Sixth Session), UNCITRAL Ybk., Vol.V, 1974, at p.119. Comments on the Multimodal Convention are in S. Mankabady, "Comments", at p.40. The Multimodal Convention, (1980), 19 Int'l Legal Materials 938, is briefly discussed in a Appendix A of this report. The Canadian proposal is put forward in UNCITRAL Ybk., Vol.V, 1974, pp.206-207.

Para. 6. The need for a bill of lading definition is discussed in Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1975, at pp.205-206 and Report of the Working Group (Seventh Session), UNCITRAL Ybk., Vol.VI, 1975, at pp.189-190.



## 2. Charterparties

### Hague Rules: Article I (b)

"contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

### Article V para.2

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules....

### Hamburg Rules: Article 2 (3)

The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

### Summary

Contracts of carriage by charterparty are exempt from the Hague Rules unless the parties invoke them by incorporation. Consequently, bills of lading on a chartered ship while in the hands of a charterer are outside the Rules, but they fall inside whenever they represent a contract of carriage with someone else, whether as the shipper or the consignee. These principles are perpetuated by the Hamburg Rules.

## Legal Commentary

1. By virtue of Article V paragraph 2, the Hague Rules do not apply to charterparties, except where they are expressly or impliedly invoked. This can occur when the charterparty itself incorporates the Hague Rules, although careful drafting is necessary to achieve the desired result. Another possibility is a bill of lading that incorporates the charterparty. Article V paragraph 2 adds that all bills of lading, even on chartered ships, must comply, for instance as to contents, with the Rules.

2. Under Article I (b) the documentary scope of the Hague Rules does include a bill of lading issued under a charterparty from the moment it regulates the relations between the carrier and a holder who is not the charterer. When a shipowner issues a bill of lading to a charterer, he impliedly gives authority to the charterer to endorse the bill and bind the shipowner. Once the bill is endorsed and delivered to a consignee, or if it is issued to a shipper who is not a charterer, it becomes a contract of carriage within the meaning of the Hague Rules. Indeed, the Rules apply retroactively to acts done in regard to the goods before the bill of lading was issued or endorsed.

3. Article 2 (3) of the Hamburg Rules is intended to have the same effect as the Hague Rules about charterparties, and to that end the wording is quite similar. The reason for continuing to except charterparties is the desire to keep separate the rules relating to contracts of carriage and to

bills of lading. Although the intention of the Hamburg Rules is to eliminate the relationship between their application and documentation, as under the Hague Rules, the exception made for charterparties may well breach that broad principle.

#### References

Para. 1. The leading case on the problems of incorporating the Hague Rules into a charterparty is Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co. [1958] 1 Lloyd's Rep. 73; [1959] A.C. 133; [1958] 2 W.L.R. 668; [1958] 1 All E.R. 725 (H. of L.). For a discussion of this case and generally on the Hague Rules and charterparties, see Tetley, at pp.10 and 19-24.

Para. 2. For a similar analysis, see Scrutton, (18th ed.), at pp.417-418 and 446, also, Tetley, at pp.19-20 and Carver, (12th ed.), at para.253.

Para. 3. The intent of the Hamburg Rules' drafters is noted in "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Doc. TD/B/C.4/ISL/19,30 October 1975, at pp.14-15. Similar discussion is found in Jan Ramberg, "The Vanishing Bill of Lading and the 'Hamburg Rule Carrier'" (1979), 27 Am. J. of Comp. L. 391, at pp.403-404.

### 3. Geographic Scope

#### Hague Rules: Article X

The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.

#### Carriage of Goods by Water Act: Section 2

Subject to this Act, the Rules relating to bills of lading as contained in the schedule (hereinafter referred to as "the Rules") have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

#### Section 4

Every bill of lading or similar document of title issued in Canada that contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the Rules as applied by this Act.

#### Hague/Visby Rules: Article X

The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if: a) the bill of lading is issued in a Contracting State; or b) the carriage is from a port in a Contracting State; or c) the Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above. This article shall not prevent a Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs.

#### Hamburg Rules: Article 2 (1), (2)

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if: a) the port of loading as provided for in the

contract of carriage by sea is located in a Contracting State; or b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State; or c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State; or d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State; or e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

### Summary

Since Canada is not a contracting party to the Brussels Convention which established the Hague Rules, they operate in Canadian law only to the extent that they have been implemented by the Carriage of Goods by Water Act (COGWA).

This Act replaces the geographic criterion for application of the Hague Rules found therein with its own. Instead of the place of issuance of a bill of lading governing the application of the Rules, COGWA imposes the place of loading of the goods. In most instances the two are in the same country, but, where they are not, Canadian law deems more important the connection with the goods than with their documents. In an attempt to impel this result even abroad, COGWA directs that every bill of lading issued in Canada for goods shipped from Canada shall contain a clause which subjects that contract of carriage to the paramountcy of the Hague Rules, as applied in Canadian law.

Neither the Hague Rules nor COGWA resort to the place of discharge of the goods as a basis for the application of the Rules, even though that is commonly where the consignee, upon receipt of damaged goods, will expect redress. As a result, a court action brought in Canada for damage to an inbound cargo will not be decided under Canadian law. It may be settled according to the law of the country where the bill of lading was issued, if that state is a contracting party to the Brussels Convention, or according to the law of the country where the goods were loaded, whether that law be a variety of the Hague Rules or some other distinctive set of national rules. The applicable law will be determined under a body of Canadian principles known as conflicts of law, which will assist the court to choose the so called proper law of this particular contract. The choice is significant because the limits of legal liability currently differ from country to country.

Conflicts of national laws were intended to be overcome by the Hague Rules through their provision of an uniform set of laws to govern the carriage by water of all international trade. Their failure, as a result of dependence solely on the bill of lading, is a subject of attention of both the Hague/Visby Rules and the Hamburg Rules. The Hague/Visby Rules enlarge the geographic scope of the Hague Rules in two ways. In part, they accumulate their existing association with the issuance of the bill of lading and the port of loading connection employed by COGWA. In part, they try to give



themselves statutory force whenever they happen to be incorporated in the carriage contract by a paramount clause. It is hoped that these means will cause the Hague/Visby Rules to apply to inward, as well as outward, carriage without expressly making them do so.

The Hamburg Rules are much more expansive. They are said to be applicable to all contracts for international carriage, though they can only be enforced so broadly if the countries involved have first agreed to them. Hence, they postulate a sweeping set of factors as individually sufficient connections between the carriage transaction and a state that is a contracting party to the Convention. The Hamburg Rules will apply to any carriage agreement by which the goods are loaded or discharged, or the bill of lading incorporates the law of or is issued in a contracting state. Direct appeal to the Hamburg Rules through a paramount clause is also acceptable. Regretably, even if the geographic scope of these connecting factors envelopes all contracts of carriage, conflicts of applicable law will still occur when the countries involved in a particular transaction are not all contracting states. In the transition from national to international uniform laws, or between the Hague, the Hague/Visby, and the Hamburg Rules, problems of choice of applicable law are inevitable and unavoidable.

## Legal Commentary

1. Canada is not a contracting party to the Hague Rules and therefore Article X is inoperative. The Rules are given the force of law in Canada by voluntary implementation through COGWA. Thus the geographic scope of the Hague Rules as applied in Canadian law is set by COGWA section 2. They only affect the carriage of goods from a Canadian port, regardless of the destination. This statement is subject to modifications contained in other sections of the Act, in particular about the coasting trade.

2. In substituting section 2 for Article X, COGWA changed the criteria for the application of the Hague Rules from the place of issuance of the bill of lading to the place where the carriage begins. It has been argued that the place of loading is not exclusively significant because the wording of section 2 would admit application of the Rules whenever the ship calls at a Canadian port. This strictly grammatical argument has not been given much credence. Section 2 also differs from Article X in applying the Rules only to outgoing carriage. American law is broader. The Hague Rules are made to apply to contracts of carriage "to or from" American ports. As a result of these divergencies, though the country of issuance of the bill of lading may be a contracting state, conflicts of law principles must be introduced to determine the appropriate law governing it. These principles ensure that the Hague Rules only have direct application in Canada to outgoing carriage and not to incoming cargoes, other than in the coasting trade. For example, if a case, in which a carriage

contract was evidenced by a bill of lading that was issued in Sweden and contained a clause applying the Hague Rules, fell to be tried in Canada because the damaged goods were discharged here, it would be determined by Swedish, not Canadian law. Which country's law applies is important because of the lack of uniformity in the amount of liability between different national versions of the Rules.

3. Section 4 directs that a bill of lading issued in Canada shall contain a clause indicating that the bill will be subject to the Hague Rules. This inclusion is commonly called a paramount clause. The section was intended to ensure that, when a carriage dispute was to be decided outside the country where the bill was issued, the Hague Rules would still apply as a matter of contract by virtue of incorporation. Although section 4 states that every bill of lading "shall contain" a paramount clause, it is only directory, not mandatory. The failure to include the clause does not nullify the carriage contract or the bill of lading, nor does it prevent the application of the Hague Rules.

4. The Hague/Visby Rules Article X attempts to enlarge the geographic scope of the Hague Rules as they relate to international, not domestic, carriage of goods, without preventing individual states from applying them even more widely. For instance, the English Carriage of Goods by Sea Act of 1971 implements the Hague/Visby Rules and extends their application to municipal carriage. By Article X (a) and (b) the Hague/Visby Rules are to apply where the bill of lading is

issued, or the carriage is from a port, in a contracting state. These provisions combine the criteria of Article X of the Hague Rules and section 2 of COGWA. They have the merit of preventing a problem of application, known to the unrevised Hague Rules, when the goods are loaded in one country and the bill of lading is issued in another non-contracting country.

5. By Article X (c) the Hague/Visby Rules are to apply whenever the bill of lading so provides or incorporates national legislation giving them effect. The intended result of this provision is to give the Hague/Visby Rules the force of statute law whenever a paramount clause is voluntarily incorporated into a bill of lading. The reason for this clause is to provide as wide a statutory and thus obligatory, coverage for the Hague/Visby Rules as possible. Where the Rules are involved merely by agreement, their provisions are construed in conjunction with the other terms of the bill of lading and may not override contradictions. The hope is, that through wide statutory coverage, the Hague/Visby Rules will also cover inward carriage.

6. The new Article X is to operate without regard to the nationality of the ship, the carrier, the consignee, or other interested persons. These referents are often used to indicate the proper law of the contract. Disregard of them further indicates the statutory effect the Hague/Visby Rules are to have. Moreover, Article X requires contracting states to apply the Hague/Visby Rules to the bills of lading it defines. It thereby would oblige a country like Canada, where

the Hague Rules apply only to outward trade, to impose the Hague/Visby Rules on inward cargoes where the carriage originates from another contracting state as well as when a paramount clause is included. This provision has been deleted by Great Britain but in its stead the English Carriage of Goods by Sea Act section 1 (2) gives the Hague/Visby Rules statutory force of law.

7. Between contracting states or in a state adhering to the Hague/Visby Rules, there is no longer a need for the paramount clause. Accordingly, the British statute contains no requirement for one to be included in bills of lading. The failure, however, to incorporate a paramount clause may create problems of conflicts of law in situations where the country whose courts must decide the dispute, is not a party to the Hague/Visby Rules.

8. Although improvements were made in the geographic scope of the Hague Rules by the Hague/Visby Rules, the drafters of the Hamburg Rules accomplished a major expansion when they wrote the Rules to apply additionally whenever the port of discharge is in a contracting state. This principle had been rejected from the Hague/Visby Rules on the grounds that: i) it would create conflicts of law because the applicable Rules would depend on the forum of litigation, and ii) the application of the Rules is a governmental act which may not be interfered with, such as by disregard by the state of discharge. These objections, plus the fear of British or American unilateral regulation of trade, were overcome during



the drafting sessions of the Hamburg Rules. Two policy arguments favoured their application to inward carriage. First, since cargo damage usually falls on consignees, they are the ones who need protection, and they are located at the port of discharge. Secondly, the makers who wanted to give the Rules as wide a scope as possible, felt that the port of discharge has a sufficient relationship to the carriage.

9. By Article 2 (1), the Hamburg Rules are to apply to all contracts of carriage by sea between two different countries, neither of which need be contracting states. Although the draft convention contained a provision similar to the Hague/Visby Rules that permitted states to apply the Rules to municipal carriage, no such clause exists in the final convention, although it seems that there is nothing to prevent such use nationally if desired. Article 2 (1) (a), which indicates that the Hamburg Rules apply when the port of loading is in a contracting state, and Article 2 (1) (d), which invokes them when the bill of lading or other document is issued in a contracting state, follow the Hague/Visby Rules. The only change is that the place of loading or issuance must be the one provided for in the contract of carriage. Article 2 (1) (e) is similar to the paramount clause provision in the Hague/Visby Rules. Article 2 (1) (b) and (c) are the new provisions that make the Hamburg Rules apply when the port of discharge, whether it be a designated or optional one under the contract of carriage, is in a contracting state. Article 2 (2) notes that, like the Hague/Visby Rules, the traditional indicators of



the proper law of the carriage of contract are not to be taken into account.

10. The laudable effort to make the geographic scope of the Hamburg Rules as great as possible will certainly create problems about the applicable law in those contracts of carriage where not all the countries involved are contracting states. The complications arise because of the variety of connecting factors used by the Hamburg Rules. The difficulties may be increased by the plaintiff's relative freedom, under Article 21, to choose his forum for litigation. Regretably, such problems are an inevitable obstacle in a transition to universally uniform laws such as the Hamburg Rules seek to promote. Canada cannot evade the hazards by persisting with the Hague Rules. Other countries can and will apply the Hague/Visby or the Hamburg Rules, so that conflicts of law will be unavoidable.

## References

Para. 1. The case that determined the meaning of "subject to this Act" was Vita Foods Inc v. Unus Shipping Co. [1939] 2 D.L.R. 1; 63 Lloyd's L.R. 21; [1939] A.C. 277; [1939] 1 W.L.R. 433; [1939] 1 All E.R. 513 (Pr.Co.). The exception for the coasting trade is discussed in Chapter II.C.4.

Para. 2. The argument on the grammatical structure of section 2 is located in Carver, (12th ed.), at para.245. The American Hague Rules legislation is United States Carriage of Goods by Sea Act 46 U.S.C.A. 1300-1315. The comments in this paragraph are from the Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at pp.150-151. The example given is based on the facts of B.G. Equipment Co. v. Care Line Canada Ro/Ro Express [1978] 2 F.C. 222 (Fed. Ct. T.D.).

Para. 3. The Vita Foods case, supra, para.1, is the leading

case on paramount clause, but see the majority judgement in Dominion Glass Co. v. The Ship Anglo Indian [1944] S.C.R. 409 (S.C.C.). The paramount clause is discussed by Tetley, at p.6; Carver, (12th ed.), at para.247 and Anthony Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Comm. L.Q. 225, at p.257. A general article on the paramount clause and American law is Erling Selvig, "The Paramount Clause" (1961), 10 Am. J. of Comp. L. 205.

Para. 4. The British Act is the Carriage of Goods by Sea Act 1971, Stats. 1971 c.19, (proclaimed in force in 1977). For a discussion of the scope of application of the British legislation that is beyond Article X (a), (b) and (c) see, Scrutton, (18th ed.), at p.451-452 and Diamond, supra para.3, at p.260. Similar analysis to this paragraph can be found in Diamond, supra, para.3, at pp.256-258 and Third Report of the Secretary-General, supra, para.1, at p.152.

Para. 5. Concerning the contractual nature of incorporated Hague Rules, see Scrutton, (18th ed.), at p.455 and Tetley, at p.15. On Article X (c), see Diamond, supra para.3, at p.258-260.

Para. 6. The use of para.2 of Article X is noted in the Third Report of the Secretary-General, supra para.1, at pp.152-153 and in Tetley, at p.15. Comments on the indicators of the proper law of contract can be found in Diamond, supra para.3, at p.258. For more information on the "force of law" provisions in the English Carriage of Goods by Sea Act, see Scrutton, (18th ed.), at pp.454-455.

Para. 7. On the paramount clause under the Hague/Visby Rules, see Tetley, at p.15 and Diamond, supra para.3, at p.258.

Para. 8. The analysis in this paragraph can be found in the Third Report of the Secretary-General, supra para.1, at pp.155-156 and Report of the Working Group (Sixth Session), UNCITRAL Ybk., Vol.V, 1974, at p.122. The comments on the Great Britain position is found in Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)" (1976), 7 J. of Maritime L. and Comm. 487, at p.502.

Para 9. It is suggested by S. Mankabady, "Comments", at p.44 that the Hamburg Rules have statutory effect where they are applicable through Article 2 (a) (b) (c) (d), but their effect is contractual if brought into application by Article 2 (e). It is submitted that this is erroneous.

Para. 10. Article 21 is discussed in Chapter IV.C.

#### 4. Period of Responsibility

##### Hague Rules: Article I (e)

"carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

##### Article VII

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by water.

##### Hamburg Rules: Article 4

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.
2. For the purpose of paragraph 1 of this Article, the carrier is deemed to be in charge of the goods
  - (a) from the time he has taken over the goods from: (i) the shipper, or a person acting on his behalf; or (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;
  - (b) until the time he has delivered the goods:
    - (i) by handing over the goods to the consignee;
    - or (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
3. In paragraphs 1 and 2 of this Article, reference to the carrier or the consignee means, in addition to the carrier or the consignee, the servants or agents,

respectively of the carrier or the consignee.

### Summary

The Hague Rules apply only while the cargo is in carriage. This period of responsibility begins when the ship's tackle is hooked on to the goods for loading and continues until they are unhooked from the lifting gear after discharging. The Hague Rules are consequently said to apply from tackle to tackle. Responsibility for the goods while in the hands of the carrier prior to loading or after discharge is governed by national laws. They differ. The Canada Shipping Act makes the carrier responsible for the care of a cargo as soon as he receives it but is unclear about his obligations after its discharge but before its delivery to the owner. In any case, the statutory standards may be, and often are, disclaimed by the carrier by a clause included for this purpose in the contract of carriage. By comparison, French and American statutes impose irrevocable responsibility.

The reforms of the Hamburg Rules are intended to make the period of the carrier's responsibility become coextensive with his custody of the cargo, and to create uniformity in the laws that apply throughout the performance of the contract of carriage. The carrier will incur responsibility under the Hamburg Rules all the time the goods are in his charge at the port of loading, during carriage, and at the port of discharge. In other words, the tackle-to-tackle rule will be replaced by a port-to-port principle. Unfortunately the Hamburg Rules are unclear about when the carrier may be said to be in charge of

the goods because he has taken them over but not yet delivered them, and about the status of stevedores when they handle cargo for him. These uncertainties are sufficient to raise doubt as to whether the Hamburg Rules will in practice achieve their laudable reformative purposes.

#### Legal Commentary

1. It is clear from Article VII of the Hague Rules that they are not applicable "prior to the loading on and subsequent to the discharge from the ship". The Rules do apply to the carriage of goods defined in Article I (e) in terms of the period of time when they are loaded on until they are discharged from the ship. These provisions are the foundation for the well established tackle-to-tackle principle: the Rules come into effect as soon as loading commences by hooking the ship's tackle on to the cargo, and continue to apply until the goods are released from the discharging tackle. When the ship's tackle is not used, the period of responsibility is fixed by the movement of the goods over the ship's rail.

2. Article I (e) refers to "loaded on" and "discharged from" in such a way as apparently to limit the carrier's responsibility to the period when the goods are fully on board. This interpretation has not been accepted. It would conflict with the carrier's fundamental obligations expressed in Articles II and III (2) as including the operations of loading, handling and discharging the cargo. Article I (e) is designed to indicate the first and last operations under the contract of



carriage, as defined in Article I (b). Any other interpretation would leave Article II and III (2) without meaning. Indeed, the Hague Rules have been held not to apply to a period of time, but to the contract of carriage, with the result that the operations of loading and discharging are subject to them. The decision was softened, however, by the addition, perhaps in contradiction of the Rules, that the parties may determine the extent to which the loading and discharging is the responsibility of the carrier.

3. In the leading case on loading, the goods were being hoisted by the ship's tackle when they fell and were damaged. The court held that, regardless of whether the goods were over the rail, once the carrier had undertaken the loading of the vessel, he was responsible under the Hague Rules and could take advantage of the limitation of liability they contain. It has been suggested that the Hague Rules would have applied, if shore tackle, and not the ship's tackle, had been used. Although this conclusion has been doubted, it does seem to follow the reasoning of the court.

4. In a case on discharge, a tractor was unloaded onto a barge from which it then fell into the sea. There the court held that this contract of carriage obliged the carrier to discharge the tractor first onto the barge and thence ashore, with the result that the Hague Rules still applied because the cargo was lost before the unloading was completed. As in the situation of loading, the responsibility for discharging depends upon the terms of the contract of carriage and not upon



any arbitrary period of time. Discharging is only complete when the operations devolving upon the ship come to an end.

5. Since pre-loading and post-discharge responsibilities are, by Article VII, outside the Hague Rules, they are within the scope of national law. The Canada Shipping Act section 657 makes a carrier responsible for the care of a cargo as soon as it is delivered to him for carriage. A reasonable clause in the bill of lading, however, that disclaims this responsibility will be upheld since it complies with Article VII of the Hague Rules.

6. Section 666 of the Canada Shipping Act makes partial provision for the discharging of cargo. Where the cargo owner does not take delivery of his goods in a reasonable time, the carrier may discharge them onto the wharf or into a warehouse and thereby terminate his responsibility for their care and safety, subject to a contrary intention located in the contract of carriage. This is a necessary provision so long as the cargo owner is obliged to look out for the arrival of the ship. What continuing obligations the carrier may have for delivery of the goods to the consignee is unclear in the Act and is still unsettled. Further, this obscure section may have no application in the face of provincial jurisdiction over this subject matter. In any event, carriers frequently contract out of the statutory duties after discharge. A clause which stated that the goods were the responsibility of the consignee after discharge was upheld by a Canadian court as reasonable and permitted by Article VII of the Hague Rules.

7. The makers of the Hamburg Rules based their preparation of Article 4 on two principles that were reached by consensus: i) the carrier should be liable for the entire period during which he is actually in charge of the goods, whether afloat or ashore; and ii) the period should not begin prior to the carrier's custody of them at the port of loading and should not continue beyond the port of discharge. These principles deliberately change the carrier's period of responsibility in the hope of unifying the regime applicable to goods during the whole of the carriage transaction. They also reflect the policy that the carrier should be fully responsible for the cargo while it is under his supervision and control.

8. The need for unification of the applicable regime of rules has arisen through differences in national law, particularly over carrier liability for custody of the goods outside the scope of the Hague Rules. The divergencies are especially noticeable between the British and Canadian contractual principles just described, and the French and American standards imposed by statute. Canada expressed general satisfaction with the provisions of the Hague Rules and opposed the attempt in the Hamburg Rules to extend carrier responsibility on the grounds that it would prejudice the application of domestic law in matters which are exclusively national.

9. Article 4 (1) lays down the basic principle that the carrier will be responsible for the goods during the time he is in charge of them at the port of loading, during the carriage

and at the port of discharge. The place of taking charge and of discharging will be restricted to the particular port. Paragraph one appears to have been drafted in this way to avoid conflict with the Multimodal Convention. In the face of the use of containers and other modern shipping practices, however, the limitation of carrier responsibility to a port may defeat the policy of equating the periods of responsibility and of cargo custody and control.

10. Article 4 (2) (a) indicates that the carrier will be deemed to be in charge of the goods when he takes them over from the shipper or from an authority to whom, pursuant to the law of the port, the goods must be handed for shipment. At what precise moment the carrier will become in charge of the goods or will have taken over the goods is not defined. Generally, but not invariably, it will occur when the bill of lading is issued. It does seem clear that the taking over of the goods will be a material fact that may be proven by any means. One important question which is as yet unanswered is whether the bill of lading may validly be used to define the moment when the carrier takes charge of the goods. An attempt to do so will have to circumvent another principle, contained in Article 23, that any clause which would derogate from the Rules will be null and void.

11. Article 4 (2) (b) indicates that the carrier will be responsible for the goods until he delivers them, which may be accomplished in any one of three ways: i) by placing them in the hands of the consignee; or ii) by handing them to the

person required by the law of the port; or iii) by putting the goods at the disposal of the consignee in accordance with the contract, or the law or the usage of the port. Delivery is a legal act which presumes the agreement of both the carrier and the consignee. It does not mean that the carrier's obligations are ended, only that the period of transport for which the carrier is responsible is finished. It has been suggested that the carrier will be able to relieve himself of responsibility for the cargo depending upon the trade usages of the discharging port or the terms of his contract as evidenced by the bill of lading. For instance, a carrier might be able to limit the scope of his responsibility by the use of a well drawn clause in the bill of lading. Article 4 (2) (b), however, may be read so as to restrict the use of such a clause to situations in which it is not possible for the consignee to receive the cargo so that alternative delivery provisions will have to come into effect.

12. By paragraph 3, Article 4 will apply to the servants and agents of the carrier and the consignee. But, the failure to mention stevedores and independent warehousemen as they handle cargo has been termed a "startling omission". It has been suggested that "agent" in this context will include an independent contractor and that the intent of Article 4 is to apply the period of responsibility during stevedoring since the cargo handlers are in charge of the goods on behalf of the carrier.

13. Although the intent of Article 4 was to make a

major change in the scope of the Rules so as to introduce the idea of port-to-port responsibility for carriers, at least one commentator has concluded that no such breakthrough was made and that tackle-to-tackle is still the rule of thumb. The uncertain details of application of Article 4 regrettably permit such an interpretation contrary to the more valuable purposes of the Hamburg Rules.

### References

Para. 2. This analysis of the Hague Rules can be found in W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at pp. 235-236. The interpretation of Article 1 (e) was made in Pyrenne Co. v. Scindina Navigation Co. [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158; [1954] 1 Lloyd's Rep. 321 (Q.B. Div.) and see, Scrutton, (18th ed.), at p.419. The Pyrenne Co. decision stated that the Hague Rules applied to the carriage contract and not to a period of time. For commentary on this, see Astle, supra, at pp.237-238 and Tetley, at p.256. The Pyrenne Co. case was followed in Renton (G.H.) and Co. v. Palmyra Trading [1956] 2 Lloyd's Rep. 379 (H. of L.), and Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd. [1973] 2 Lloyd's Rep. 469; [1974] S.C.R. 933; 37 D.L.R. (3d) 545 (S.C.C.). The point on the narrow interpretation of Article III (2) is in First Report of the Secretary-General, UNCITRAL Ybk., Vol.III, 1972, at p.268. Article III (2) is discussed in Chapter III.C.

Para. 3. These were the facts and decisions in the Pyrenne Co. case, supra para.2. The suggestion was made by Tetley, at p.256 and doubted by Astle, supra para.2, at p.239.

Para. 4. These were the facts and decisions in the Falconbridge Nickel case, supra para.2. On similar facts a contrary decision was reached in The Arawa [1977] 2 Lloyd's Rep.416, appealed on another point [1980] 2 Lloyd's Rep. 135 (Q.B. Div. Adm. Ct.). Another well-known discharge case is Goodwin, Ferreira and Co. v. Lamport and Holt Ltd., (1929), 34 Lloyd's L.R. 192 (K.B. Div.) and see, Tetley, at pp.279-280 and Astle, supra para.2, at pp.239-240. The termination of discharge is noted in Scrutton, (18th ed.), at p. 421.

Para. 5. On the Canada Shipping Act, R.S.C. 1970, c.S-9, see



Tetley, at pp. 259-260 and see Appendix D "Delivery Provisions of the Canada Shipping Act."

Para. 6. On the interpretation of section 666 of the Canada Shipping Act, see Carver, (12th ed.), at para. 1038 and Payne and Ivamy's Carriage of Goods by Sea (11th ed.), (London, Butterworths, 1979), at pp.143-144. For the Canadian law on discharge see Tetley, at pp. 283 and 290. The case referred to is Robert Simpson v. Canadian Overseas Shipping Co. [1973] 2 Lloyd's Rep. 124 (Que. C.A.). A list of what needs to be done by carriers after discharge can be found in Tetley, at p.282. Note also Appendix D "Delivery Provisions of the Canada Shipping Act."

Para. 7. The two points at the basis of Article 4 are described in Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part One)" (1976), 7 J. of Maritime L. and Comm. 69, at p. 78 and Report of the Working Group (Third Session), UNCITRAL Ybk., Vol.III, 1972, at pp.253-255.

Para. 8. For a brief discussion of the American and French law, see Sweeney, supra para. 7, at pp.80-82 and Tetley, at pp.260, 287 and 291-292. D.E. Murray in "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at p.62 states that the Hamburg Rules "have deliberately, or perhaps inadvertently, copied the Harter Act, which provides that the carrier is liable from the time it takes possession of the goods until it delivers the goods to the consignee." The Canadian position can be found in the First Report of the Secretary-General, UNCITRAL Ybk., Vol.III, 1972, at p.269, fn.33 and Canada's comments on the UNCITRAL Draft Convention in UNCITRAL Ybk., Vol.V, 1974, at p.207.

Para. 9. Concerning the Multimodal Convention, see S. Mankabady, "Comments", at p.51. The problem of the port as a place of taking over the goods is discussed in Leopold Peyrefitte, "The Period of Maritime Transport: Comments on Article 4 of the Hamburg Rules", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp.130-133.

Para. 10. Discussion of paragraph 2 (a) can be found in S. Mankabady, "Comments", at pp.50-52 and Peyrefitte, supra para.9, at pp.129-130. Peyrefitte believes that a clause defining the time the carrier takes charge of the cargo would alter the scope of the carrier's obligation and would be invalid by Article 23. Mankabady leaves it open saying that if the clause can be regarded as limiting the scope of the Rules, then the clause is void. If, however, the clause is considered to define the moment that the carrier takes over the goods, the clause is valid. Tetley, in "Canadian Comments on the Proposed UNICTRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime L. and Comm. 251, at p.260 suggests



that the clause would relieve the carrier of responsibility until it was defined to come into effect in the bill of lading.

Para. 11. This discussion of paragraph 2 (b) is in Peyrefitte, supra para.9, at pp.133-134. The suggestion that the carrier can relieve his responsibility at the port of discharge is in Tetley, supra para.10, at p.261 and Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Comm. L.Q. 1, at p.16.

Para. 12. A discussion on the status of stevedores and independent contractors may be found in Chapter II.A.4. For comments on Article 4 (3) and stevedores see, Murray, supra para.8, at pp.62-63 and Peyrefitte, supra para.9, at p.126.

Para. 13. This conclusion is reached by Tetley, supra para.10, at p.261 and Tetley, supra para.11, at p.16.

## 5. Through Carriage

### Hamburg Rules: Article 10

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of Article 7 and of paragraph 2 of Article 8 apply if an action is brought against a servant or agent of the actual carrier.
3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.
4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.
5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.
6. Nothing in this Article shall prejudice any right of recourse as between the carrier and the actual carrier.

### Article 11

1. Notwithstanding the provisions of paragraph 1 of Article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay

in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraphs 1 or 2 of Article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of Article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

### Summary

The absence of provisions in the Hague Rules referring to through carriage has contributed to the problems of transshipment, which have greatly increased in frequency with the advent of containerized transportation. Transshipment may occur pursuant to a through bill of lading, perhaps in multimodal carriage, or under an ocean bill of lading that contains a "liberty clause" by which the carrier is free to transfer the cargo to others to deliver.

In both circumstances, carriers often disclaim all responsibility for cargo outside the time when they actually carry it. The freedom to disclaim responsibility appears generally irreproachable under the Hague Rules as they only apply to each carrier while the goods are in water carriage. The consequent problems that may arise for an owner of damaged cargo can be immense. He must first discover, if he can, the occasion of the damage to his goods in order to sue the appropriate carrier, or possibly a cargo handler at the port of transshipment. Additionally he may not know what contract

terms or law apply to his problem because consecutive carriers have issued separate and conflicting bills of lading. These difficulties of proof and of law may force the cargo owner to take suit against all the carriers and cargo handlers in numerous, far flung jurisdictions if he is to recover compensation. Such multiplicity of litigation is a wasteful expense for all involved, but especially to the cargo owner.

The Hamburg Rules offer a simple, if sweeping, remedy. While the actual carrier will continue to be liable for his own acts, the contracting carrier will also be responsible for the goods, upon the terms and law of his contract, throughout the whole of the carriage until they are finally delivered. Out of deference to shipowning interests, an important exception will permit the contracting carrier to exempt himself from liability after he has transshipped the goods where the contract explicitly provides for its continued performance by a different, named carrier. The Hamburg Rules ensure that a cargo owner will not be able to collect compensation totalling more than the ordinary limits of liability and that a contracting carrier who pays compensation will have recourse against the actual carrier at fault.

#### Legal Commentary

1. Transshipment problems commonly arise in one of two particular ways: i) under a through bill of lading in which the port of transshipment is designated, and ii) through the use of

a general "transshipment" or "liberty" clause in a bill of lading, by which the carrier is given the option to transfer the cargo to other carriers to deliver to its stated destination. Under the through bill of lading the shipper is aware that there is to be transshipment at a particular port and the carrier is obliged to inform the shipper, or the consignee, or both, of the names of the on-carrier. Many through bills contain clauses that limit a carrier's responsibility to the period of his actual carriage. Such clauses are permissible under the Hague Rules since the period of responsibility for carriage is from "tackle-to-tackle". The distressed cargo owner is not harmed by each carrier's limitation of liability since he can sue the named actual carrier who is responsible, unless, as often is the case, he cannot discover where in the transit or transshipment his goods were damaged. In partial resolution, the Hague Rules permit carriers to contract responsibility prior to or after their act of carriage.

2. The existence of "transshipment" or "liberty" clauses in a bill of lading is for the benefit of carriers to facilitate commercial flexibility in the routing of cargoes. The mere right to transship does not affect the contracting carrier's responsibilities since the transshipment is in the performance of the contracted carriage, and therefore the Hague Rules would continue to apply. Usually, however, liberty clauses include provisions stating that the contracting carrier's responsibility ends at the point of transshipment.

The validity of these provisions are in doubt since Article 3 (8) prevents derogation from the responsibilities in the Hague Rules. In English and Canadian jurisprudence only one case appears to consider the problem at all and it determined that the transshipment clause was valid.

3. Another problem of carrier responsibility arises when the damage to cargo takes place at the port of transshipment and the contracting carrier has successfully either terminated the application of the Hague Rules or restricted his liability to the period of actual carriage. This type of problem occurs quite as readily under through bills as by the use of transshipment clauses. In a recent Canadian case a transshipment clause contained in the bill of lading did not mention the location of the port of transshipment, but did declare that the contracting carrier was not responsible for the goods beyond his handling of them. Damage occurred during storage at the transshipment port. The Court found the contracting carrier was not responsible for the goods during storage since the contract of carriage had ended at the time of their discharge.

4. In many transshipment situations a new bill of lading is issued when the goods are transshipped. This practice creates great uncertainty as to whether, in cases of conflict, the cargo owner is bound by the original bill of lading or the on-going carrier's bill of lading or both. In the practice of through bills of lading, where this situation is most likely to arise, the two bills will be construed so as



to give effect to both. If they are incompatible, the through bill will prevail. The greatest uncertainty appears to be whether the application of the Hague Rules is to be decided on the basis of each bill of lading issued during the carriage or on the basis of the first bill of lading in respect of the entire carriage.

5. It is clear from this discussion that the transshipment clauses favour the carrier to the detriment of the cargo owner. The cargo owner is left in the position of not knowing to whom to look for compensation for damage to his goods since the ability to determine where the loss occurred, which is his burden to prove, is not easily within his power. His difficulties are further complicated by the uncertainty over which law to apply. As a result, an aggrieved cargo owner may have to take suit against all the carriers involved with his goods as well as all those who handled them at far off ports of transshipment. The wasteful likelihood of multiple suits in numerous jurisdictions is an unworkable situation for the cargo owner in most situations.

6. The Hamburg Rules, Article 10 (1), provide a radical change in the approach of carriage law to transshipment and to the problems a cargo owner may have in identifying the carrier that is to bear the responsibility for cargo damage. Article 10 (1), read together with the definition of carrier in Article 1 (1), means that the person who originally concluded the contract with the shipper will remain responsible for the goods regardless whether they are transshipped, or whether they are

actually carried by another carrier. The latter situation occurs under the Hague Rules with the use of a demise clause or in situations where the contracting carrier does not perform the actual carriage.

7. There was little debate whether the general principle under Article 10 (1) should apply to "liberty" or "transshipment" clauses in bills of lading, but there was much discussion about the application of the contracting carrier's responsibility for the full carriage under a through bill of lading. It was argued that the application of Article 10 (1) to through bills would reduce the use of this commercially valuable document because its wording would permit, even encourage, carriers to terminate the carriage by indicating that the intermediary port was the port of discharge. The counter argument emphasized that a contracting carrier would still have recourse against the actual carrier who caused the damage and that it was easier for the contracting carrier than for the cargo owner to ascertain who was responsible for the loss. Also, it was agreed that in current practice carriers assume liability for the entire through-carriage. The compromise that was reached is expressed in Article 11 (1). It allows the contracting carrier to exempt himself from liability for the on-going portion of the carriage where the contract explicitly provides for its performance by a named actual carrier.

8. Article 11 (1) has been roundly criticized for providing a major loophole for the exoneration of contracting

carriers who would otherwise be within the scope of the Hamburg Rules. This loophole is closed when the cargo owner cannot take judicial proceedings against the actual carrier pursuant to Article 21. At least the burden of proving that the damage occurred during the on-going carriage will be on the contracting carrier. Article 11 (1) was narrowly adopted with the help of expert argumentation by shipowner nations, who induced shipper countries to vote against their best and stated interests.

9. Articles 10 (2) and 11 (2) make it clear that the actual carrier will always be responsible for the carriage performed by him, regardless of the contracting carrier's liability. Article 10 (6) indicates that the contracting carrier will be able to recover from the actual carrier in situations where the damage is caused by the actual carrier and the cargo owner recovers from the contracting carrier. The cargo owner, by Article 10 (5), will not be able to recover in total more than the limits of liability provided in the Rules.

10. Although by Article 10 (1) the contracting carrier will be responsible for the "entire carriage", this phrase is limited to the period of responsibility expressed in Article 4. The uncertainty over liability for cargo damage that occurs during transshipment is overcome by Article 10 (1) fixing responsibility on the contracting carrier. Article 11 (1) will allow the contracting carrier to escape responsibility only when the named actual carrier is in "charge of" the goods, which would not include their handling during transshipment.

The problem of the on-going carrier issuing bills of lading that conflict with the original contract of carriage also appears to have been settled. The contracting carrier will remain responsible under the original contract of carriage even where a bill of lading is issued by an on-going carrier. Indeed, it may be implied that the contracting carrier is responsible for the bill issued by the actual carrier, presumably not so as to limit or exclude its responsibilities as defined under the contract of carriage.

#### References

Para. 1. Concerning the through bill of lading and transshipment see Tetley, at pp.467-468 and Erling Selvig, "Through - Carriage and On - Carriage of Goods by Sea" (1977), 27 Am. J. of Comp. L. 369, at pp.375-77. In Carver, (12th ed.), at para. 277 it is argued that in the case of through carriage the port of transshipment is the port of discharge which terminates the contract of carriage and the Hague Rules, therefore, cease to apply. The obligations on the carrier in a through bill situation are listed in Tetley, at pp.468-469. On the through bill of lading generally, see Tetley, at pp.465-474; Scrutton, (18th ed.), at pp.371-379, and Carver, (12th ed.), at paras. 200-203.

Para. 2. On the transshipment clause, see Selvig, supra para.1, at pp.375-376 and Carver, (12th ed.), at para. 277. The case on the validity of the transshipment clause is Marcellino Gonzalez v. James Nourse Ltd. [1936] 1 K.B. 565; 53 Lloyd's L. Rep. 151 (K.B. Div.). It has been interpreted by both Scrutton, (18th ed.), at p.430 and Carver, (12th ed.), at para. 276, as indicating that British courts would not invalidate a transshipment clause. W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p.66 discusses the case, but states that the case only partially answers the question of the validity of transshipment clauses. In the Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p.175, reliance is put on Scrutton and the Marcellino Gonzalez case for the position that the transshipment clauses are usually valid and permit the contracting carrier to limit responsibility. Tetley, at p.472, not mentioning the Marcellino Gonzalez decision, determines that a clause permitting the carrier to transship at any time

would be invalid because of Article 3(8).

Para. 3. Concerning responsibility at the port of transshipment, see the Second Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1973, at p.175. The Canadian case is Captain v. Far Eastern Steamship Co. (1978), 7 B.C.L.R. 279 (B.C.S.C.). The court ultimately decided that there had been a fundamental breach of contract, so the cargo owner recovered. It appears that the clause permitting the contracting carrier to limit liability was not challenged under Article 3(8) in this case.

Para. 4. For comments on multiple bills of lading covering carriage and transshipment, see the Second Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1973, at p.175; Scrutton, (18th ed.), at p.373; and Carver, (12th ed.), at para.201.

Para. 5. The cargo owners problems are noted in the Second Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1973, at p.175 and Tetley, at pp.469-470.

Para. 6. Concerning Article 10(1) and the demise clause, see the previous discussion of the definition of carrier in this chapter in Section A.1, and "Bills of Lading-Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping," U.N.Doc. TD/B/C.4/ISL/19, 30 October 1975, at pp.32-33.

Para. 7. On the debate on on-going carriage under a through bill of lading, see Report of the Working Group (Fifth Session), UNCITRAL Ybk., Vol.IV, 1973, at pp.207-209 and Selvig, supra para.1, at p.383.

Para. 8. The criticism of Article 11(1) commenced when the working group considered it; see Report of the Working Group (Fifth Session), UNCITRAL Ybk., Vol.IV, 1973, at p.208-209. The Secretary-General of UNCTAD in "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping," U.N.Doc. TD/B/C.4/ISL/19, 30 October 1975, at p.35 calls for the removal of Article 11(1). The Canadian official position was that Article 11(1) should be deleted; see Canada's comments on the UNCITRAL Draft Convention in UNCITRAL Ybk., Vol.V, 1974, at p.209. Professor Tetley has termed Article 11(1) a "dangerous exception" to Article 10 in "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime Law and Comm. 251, at p.262. Concerning the vote on Article 11(1), see Tetley, "Articles 9 to 13 of the Hamburg Rules" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at p.200.



Para. 9. For comments on the Articles discussed in this paragraph, see Selvig, supra para.1, at pp.384-389.

Para. 10. Further comments on the points in this paragraph can be found in Selvig, supra para.1, at pp. 381, 384 and 378-379. The definition of "in the charge of" is discussed with Article 4 of the Hamburg Rules in supra Section C.4. The implication about multiple bills arises from Article 14(2), which is discussed in Chapter III.A.



C. TO WHAT THE RULES APPLY

Introduction

The Hague Rules apply to all kinds of goods except live animals and deck cargo. Consequently the carrier can, and regularly does, disclaim all responsibility for their safe carriage. The Hamburg Rules include live animals and deck cargo in their application thus imposing a duty of care on the carrier, but varying the ordinary standard according to special conditions. Articles of transport, such as containers that belong to the cargo owner are also included in the Hamburg Rules.

An obscure article of the Hague Rules permits the carriage of "particular goods" to be free from the legal restraints of the Rules provided they are shipped under a non-negotiable receipt and not a bill of lading. This exception for non-commercial shipments and experimental arrangements has been so little used that it is omitted from the Hamburg Rules. This provision was chiefly significant in Canada as a result of its conversion by COGWA to apply to the coasting trade as well, thus freeing domestic carriage of international regulation. The omission will not restrain Canada from establishing national controls on the coasting trade as the Hamburg Rules only apply to international carriage.

This section discusses these topics as follows:

1. Deck Cargo

2. Live Animals
3. Goods and Packaging
4. "Particular Goods" and the Coasting Trade

## 1. Deck Cargo

### Hague Rules: Article I (c)

"goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

### Hamburg Rules: Article 9

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.
2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee who has acquired the bill of lading in good faith.
3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.
4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act of omission of the carrier within the meaning of article 8.

### Summary

Deck cargo was exempted from the application of the Hague Rules because of the greater risks of safe carriage compared to other goods stowed under deck. As a result, the

carrier may disclaim responsibility, and thus evade liability, for cargo carried on deck even though the cause of loss is unrelated to the mode of carriage. Modern methods of stowage and the use of containers has increased the volume of goods carried on deck, has shaded the physical distinction between above and below deck, and has substantially reduced the disparity in risks. There is no longer justification for the total exclusion of deck cargo from the operation of the Rules.

The Hamburg Rules recognize the current circumstances by including deck cargo within their application and permitting such carriage where there is agreement, usage or law requiring it so. The carrier will bear the same responsibility of reasonable care for on and below deck cargo. Goods that are carried on deck without their owner's agreement and are lost, damaged or delayed as a result solely of being placed there, will attract more severe liability, without proof of fault on the part of the carrier, although he may continue to limit the extent of his compensation in the usual way. Deck carriage contrary to an express agreement for carriage under deck will prevent the carrier from limiting his liability for the cargo.

In effect, the Hamburg Rules assimilate deck cargo with the other goods carried, but they distinguish the degree of the carrier's responsibility for it according to express agreement about the mode of carriage. No definition of deck cargo is supplied. Unfortunately the measure of legal liability will turn on whether the goods in dispute were carried on or under deck which modern ship design may make an increasingly

difficult physical distinction to draw.

### Legal Commentary

1. Article 1 (c) of the Hague Rules excepts cargo "which by the contract of carriage is stated as being carried on deck and is so carried". Originally the exemption was a special concession to the Baltic trade in lumber, which was the only cargo normally carried on deck. The risks of peril from the sea were much greater for deck cargo, so the carrier was permitted contractual freedom to reduce or avoid liability for the cargo. The wide use of containers and safer stowage methods has induced an increase in on deck cargo and thereby expanded the legal significance of its exemption from the Rules.

2. Determining when goods are carried on deck is not always easy, since the cargo may be carried in a closed steel container that is above the deck, or it may be covered in such a way as to give it the same security as below deck. To fall within the Article 1 (c) exemption, there must be agreement that the goods are to be carried on deck, and the goods must in fact be carried on deck. It is not sufficient that the carrier, by a "liberty" clause in the bill of lading, may carry the goods on deck. The bill of lading must state that the goods are to be carried on deck. In a case in which the bill of lading stated the goods were to be carried on deck and the goods were so carried, but the shipper had not agreed to ship the cargo on deck, the Hague Rules were held not to be

applicable. Conversely, where the shipper was aware that the goods were to be carried on deck but the bill of lading did not so state this fact, the Hague Rules were held applicable. The presumption is that a clean bill of lading means the goods are to be carried below deck.

3. Even where the bill of lading adequately states that cargo is to be carried on deck, where the cargo is stowed below deck throughout the carriage or even for part of the carriage, the carrier is responsible for the goods under the Hague Rules. Such a situation occurred when a yacht was properly placed on deck, but after being damaged it was moved below deck. The court held the Hague Rules applicable throughout the entire voyage.

4. Where the bill of lading states that the goods are to be carried on deck and this statement accurately reflects the agreement between the parties, the Hague Rules are not applicable from the beginning of the carriage. Thus where deck cargo was damaged while being loaded, it was determined that the Hague Rules had no applicability and that the carrier could limit his responsibility for the goods from the beginning. It can be inferred from the court's decision that before Article 1(c) could be applicable to deck cargo it had to be loaded and carried. This result indicates that where deck cargo is involved the carrier is not responsible under the Hague Rules at all.

5. The Hague/Visby Rules make no changes to deck cargo, but section 1 (7) of the U.K. Carriage of Goods by Sea Act of



1971, which implemented them in Britain, provides that in certain cases a bill of lading which invokes the amended Rules will cover deck cargo and live animals. In these circumstances a carrier will bear the same responsibility for animals and for goods carried on deck as any other cargo.

6. The Working Group of UNCITRAL reviewed three particular problems relating to the on deck provisions of the Hague Rules: i) carriers may escape liability for cargo damage completely unrelated to carriage on deck; ii) containers, which can be carried as safely on as below deck, are not covered by the Rules unless they are expressly included; iii) there is a lack of clarity about when goods are on or below deck. In preparing Article 9 of the Hamburg Rules, the drafters tried to reflect three principles which they felt should be included in provisions respecting deck cargo. These principles are: i) the carrier may only carry deck cargo pursuant to an agreement with the shipper, usage, or statutory requirement; ii) agreements to carry deck cargo must be reflected in a statement of the bill of lading ; iii) where no agreement is included in the bill of lading, the carrier may prove the existence of one.

7. Under Article 9 deck cargo is included in the ambit of the Hamburg Rules. Article 9 (1) states that the carrier may carry goods on deck only if the carriage is in accordance with an agreement with a shipper, with the usage of the trade, or is required by statute. Under Article 9 (4), if the carrier stows cargo on deck where carriage under deck has been expressly agreed, the carrier is deemed to have lost any right

to limit responsibility under the Hamburg Rules. It has been suggested that Article 9 (4) should be the basic rule and not Article 9 (1), although there is a problem with the meaning of an "express statement". By Article 9 (2), where goods are to be carried on deck, the bill of lading shall contain a statement to that effect. In the event no such statement is included, the carrier has to prove the existence of an agreement for deck cargo, although even then it cannot be invoked against a third party. Where goods have been carried on deck without agreement or in such circumstances that the carrier cannot rely on any agreement, it appears that he will be held strictly liable for damages resulting solely from the carriage of the cargo on deck, notwithstanding the usual defence, (that he took all reasonable precautions), expressed in Article 5 (1).

8. In Article 9 (1) three exceptions are given to the provision that cargo is not to be carried on deck. One exception arises when a statute requires the goods to be carried on deck. Unfortunately, there is no explanation of the state whose legislation would be operative. Another exception is made for cargo carried on deck by usage of the trade, but there is no definition of usage, with the resulting uncertainty whether, for instance, the employment of containers in some trades is included or not. The third exception occurs when an agreement is made between the shipper and the carrier to carry the goods on deck, but the nature of such an agreement is unexplained. In all these cases the ordinary standard of care,

contained in Article 5 (1), still applies to deck cargo. For this reason, it has been suggested that Article 9 (1) is redundant, although breach of its provisions may incur stricter liability for the carrier. Where there is an agreement between the shipper and the carrier, the application of the technical provisions of Article 9 will turn on the meaning of carriage "on deck" but unfortunately the Hamburg Rules still do not provide a definition of deck cargo.

9. It is unclear whether a "liberty" clause permitting deck cargo constitutes an "agreement" under Article 9 (1) or a "statement" under Article 9 (2). There is considerable doubt as to the precise effect of Article 9 (3), especially as it inter-relates with Article 5 (1).

10. The fundamental change in the Hamburg Rules as they relate to deck cargo is that they cover this kind of cargo so that the responsibilities for it will be determined by Article 5 (1). However the complicated variations on limits of liability contained in Article 9 will surely lead to creative litigation and interpretation.

### References

Para. 1. Background to the on deck exception is noted in the First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 271.

Para. 2. Concerning the definition of deck cargo, see the First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 271. The leading case on the "liberty" clause, indicating it is not sufficient to limit application of the Hague Rules, is Svenska Traktor v. Maritime Agencies Ltd. [1953] 2 Q.B. 295; [1953] 3 W.L.R. 426; [1953] 2 All E.R. 570; [1953] 2 Lloyd's Rep. 124 (Q.B. Div.). This case was followed in Grace Plastics Ltd. v. The Bernd Wesch II [1971]

F.C. 273 (Fed. Ct. T.D.) and see Tetley, at pp. 323-324; Scrutton, (18th ed.), at p. 419, and Carver, (12th ed.), at para. 254, fn.23. In Guadano v. The S.S. Cap Vincent [1973] F.C. 726 (Fed. Ct. T.D.) the court held that a "liberty" clause was valid to limit the application of the Hague Rules, where on deck cargo was the "usual carrying place" for the cargo. This case is doubted in Tetley, at p. 326. The case where there was no agreement to carry the goods on deck is Sherwood v. The Lake Eyre [1970] Ex. C.R. 672 (Ex. Ct.), but note S. Mankabady, "Comments", at p. 77. In St. Simeon Navigation v. Couturier and Fils Ltee (1973), 44 D.L.R. (3d) 478 (S.C.C.) the court found that a clause providing that goods stowed on deck shall be deemed to be stowed, is not a specific statement of carrying the goods on deck as required for Article 1 (c). On the clean bill of lading presumption see Tetley, at p. 319.

Para. 3. The facts given are from Colonial Yacht Harbour Ltd. v. The Octavia [1980] 1 F.C. 331 (Fed. Ct. T.D.). The court used as authority Scrutton, (18th ed.), at p. 419, but the discussion was obiter.

Para. 4. The situation given is from H.B. Contracting v. Northland Shipping (1971), 24 D.L.R. (3d) 209 (B.C.C.A.). It has been suggested, on the basis of Shaw, Savill and Albion Co. v. Electric Reduction Sales Co. (The Mahia) [1955] 1 Lloyd's Rep. 265, that the carrier was under a duty to properly load, stow, care for and discharge on deck cargo, see Tetley, at p. 321. The carrier's ability to eliminate all responsibilities under the Hague Rules is noted in the First Report of the Secretary-General, UNCITRAL Ybk., Vol.III, 1972, at p. 272.

Para. 5. The British Act is Carriage of Goods by Sea Act 1971, 1971 c. 19, (proclaimed in force in 1977). The analysis of the British Act is from Anthony Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial L.Q. 225, at pp. 262-263 and reference can be made to Tetley, at p. 330 and W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p. 3.

Para. 6. The three problems were discussed in the First Report of the Secretary-General, UNCITRAL Ybk., Vol.III, 1972, at pp. 271-274 and listed in the Report of the Working Group (Third Session), UNCITRAL Ybk., Vol.III, 1972, at p. 256. The three principles are noted in the Report of the Working Group (Third Session), at p. 257.

Para. 7. Tetley, "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime Law and Comm. 251, at 265 suggests that Article 9 (4) should be the basic rule for deck cargo.

Para. 8. The comments and conclusions in this paragraph are from "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Doc. TD/B/C.4/ISL/19. 30 October 1975, at pp. 30-31. Note should also be made of Tetley, supra para.7, at p. 265.

Para. 9. On the problems noted here, see Tetley, supra para.7, at p. 265 and "Bills of Lading - Comments," supra para.8, at pp. 31-32.

## 2. Live Animals

### Hague Rules: Article I (c)

"goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

### Hamburg Rules: Article 1 (5)

"Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

### Article 5 (5)

With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

### Summary

Like deck cargo, live animals are outside the Hague Rules because their carriage poses greater risks. Consequently, carriers may refuse to accept any responsibility for harm to live animals even though the cause of the loss has nothing to do with the special risks attending them.

The Hamburg Rules strive to reverse this situation without implicating the carrier in any of those special risks. By including live animals in the definition of goods, the carrier is bound to display the ordinary standard of care of



cargo towards them. While the carrier is specifically exempted from liability for special risks inherent to live animals, it will usually be up to their owners to show that the cause of loss was not such a risk but something within the usual scope of carrier responsibility.

### Legal Commentary

1. Live animals are specifically excluded from the operation of the Hague Rules by Article 1 (c). Such an exclusion is not surprising given the special hazards presented by this type of cargo. As with deck cargo however, the carrier is able to avoid responsibility whenever animals are carried, regardless of whether the loss is caused by the inherent nature of living creatures.

2. The drafters of the Hamburg Rules sought to alter this situation so as to give the Rules the widest scope possible. The decision was made to include the carriage of live animals within the application of the Hamburg Rules but to relieve the carrier of the peculiar risks of this cargo. Accordingly, the definition of goods in Article 1 (5) expressly includes live animals, while Article 5 (5) was drafted to relieve the carrier of special risks inherent in carrying them. The carrier will have the burden of proving that he has complied with any special shipping instructions, but, if he does so, then a loss that could be attributable to the special risks involved in the carriage of live animals will be presumed to have been so caused. This presumption may be rebutted by

the cargo owner by proving that at least part of the loss was caused through the fault of the carrier.

3. In effect, Article 5 (5) leaves the owner of live animals free to prove that the cause of his loss was not a specific risk of the cargo but an ordinary one within the usual responsibility of the carrier. These provisions for live animals are considered an improvement over the Hague Rules.

#### References

Para. 1. On live animals and the Hague Rules, see the First Report of the Secretary-General, UNCITRAL Ybk., Vol.III, 1972, at p. 275 and more generally on live animals, "Study on Carriage of Live Animals", UNCITRAL Ybk., Vol.III, 1972, at pp. 165-189. The effect of the 1971 British Carriage of Goods by Sea Act is discussed in Deck Cargo, Chapter II.C.4, at paragraph 5.

Para. 2. On these interpretations, see S. Mankabady, "Comments", at p. 57 and the Report of the Working Group (Sixth Session), UNCITRAL Ybk., Vol.V, 1974, at pp. 129-131. On the burden of proof, see John A. Maher, Jr. and Joan D. Maher, "Marine Transport Cargo Risks and the Hamburg Rules - Rationalization or Imagery?" (1980), 84 Dickinson Law Review 183, at p. 210.

Para. 3. This conclusion is reached by Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Commercial L.Q. 1, at p. 16.

### 3. Goods and Packaging

#### Hague Rules: Article I (c)

"goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

#### Hamburg Rules: Article 1 (5)

"Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such articles of transport or packaging if supplied by the shipper.

#### Summary

The Hague Rules' definition of goods has proved broad enough to cover all kinds of cargoes ever carried, apart from the explicit exceptions for live animals and deck cargo. The Hamburg Rules are intended to be all inclusive and have therefore left the range of goods undefined. For greater certainty, they expressly include live animals as well as containers, pallets and other packaging when supplied by the shipper of the goods.

#### Legal Commentary

1. The definition of goods in the Hague Rules has already been discussed as it excepts deck cargo and live animals. Otherwise, it has been considered broad enough to include articles of any type and products of all kinds. In the drafting of the Hamburg Rules the definition of goods was considered at the same time as live animals and deck cargo. As

has been noted, both have been included in the new Rules.

2. Article 1 (5) of the Hamburg Rules essentially leaves the definition of goods wide open, except that it explicitly includes live animals and packaging if supplied by the shipper. Some objection was made to packaging on the ground that its inclusion might encourage claims even where there was no damage to the goods themselves. Canadian comments on the Hamburg definition of goods indicated that the carrier might have to increase freight rates to protect himself against responsibility for damage to packaging, particularly containers.

#### References

Para. 1. In Tahsis Co. v. Vancouver Tug Boat (1965), 54 W.W.R. 395 (B.C.S.C.) wood chips were considered to be goods within Article 1 (c).

Para. 2. The objection to the Hamburg Rules formulation is one of several found in Report of the Working Group (Eighth Session), UNCITRAL Ybk., Vol.VI, 1975, at p. 233. Canada's comments on the UNICTRAL Draft Convention can be found in UNCITRAL Ybk., Vol.V, 1974, at p. 206.

#### 4. "Particular Goods" and the Coasting Trade

##### Hague Rules: Article VI

Notwithstanding the provisions of the preceeding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect. Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the charterer or condition\* of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

##### Carriage of Goods by Water Act: Section 5

Article VI of the Rules, in relation to the carriage of goods by water in ships carrying goods from any port or place in Canada to any other port or place in Canada, has effect as though that Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

##### Summary

Article VI exempts the carriage of "particular goods" from the operation of the Hague Rules provided they are shipped under a non-negotiable receipt, containing the terms of an alternative arrangement, and not under a bill of lading. The scope of Article VI is most uncertain because of the vague

description of "particular goods" merely by allusion to non-commercial shipments requiring special handling. In international practice, the exception has been so little used that it is omitted from the Hamburg Rules.

COGWA section 5 increases the domestic significance of Article VI by converting it to apply to all goods moving in the Canadian coasting trade. Thus carriage from port to port within Canada is freed from the Hague Rules provided the other requirements of Article VI are met. Since the Hamburg Rules only apply to international trade, they will not interfere in the separate national regulation of Canadian coastal traffic, unless so extended by enactment.

#### Legal Commentary

1. Article VI of the Hague Rules is a convoluted section that provides a special regime when "particular goods", which are not an ordinary commercial shipment, are to be shipped. The carrier and the shipper may conclude a special agreement and thus exclude the application of the Hague Rules, provided that no bill of lading or similar document of title is issued. The terms of their agreement, however, must be embodied in a non-negotiable receipt, which is clearly marked as such. The purpose of this section appears to have been to encourage developments in the carriage of goods by permitting experimentation with new carriage processes and with new or unusual cargoes.

2. The definition of "particular goods" has not been



judicially considered but it appears that the cargo must be of a kind that requires special handling so as to justify a special agreement between the carrier and the shipper. It has been suggested "particular goods" are those that require the carrier to perform services altogether different from his usual duties. While no bill of lading is to be issued, a non-negotiable receipt must be. Moreover, the receipt must be marked as non-negotiable and must contain the terms of the special agreement reached between the carrier and the shipper. "Non-negotiable" does not have a technical meaning, but in the context of Article VI it probably means that the receipt is not transferable under Canadian Bills of Lading Acts. In the event that the document does not contain the terms of the special agreement, or is not a receipt, or is not marked as non-negotiable, then it will be treated as if it were a bill of lading or similar document of title to which the ordinary principles of the Hague Rules apply.

3. The special agreement must not limit the responsibility of the carrier to provide a seaworthy vessel to such an extent as to be contrary to public policy. There has been no decision in which stipulations in a special agreement have been disallowed as contrary to public policy.

4. Section 5 of COGWA, referred to as the "coasting trade" clause, is designed to prevent the Hague Rules from affecting Canadian coastal trade. It does so by deeming Article VI applicable to all goods, regardless of character, that are carried from port to port wholly within Canada. As a

result the carrier and the shipper are free to contract on their own terms provided no bill of lading is used but a non-neogitable receipt, containing their agreement, is issued. The special agreement may not limit obligations respecting seaworthiness contrary to public policy.

5. The Hague/Visby Rules contain Article VI unaltered, but the British Carriage of Goods by Sea Act of 1971 deleted the equivalent to COGWA Section 5, thereby creating confusion in the coasting trade in the United Kingdom.

6. Although generally considered to be little used, Article VI has been applied to goods carried by the Ro-Ro method, thus ousting them from the Hague Rules. The drafters of the Hamburg Rules, however, thought Article VI so vague and unused that they opted to delete any reference to "particular goods" or "special agreements". Concerning the coasting trade, it has previously been noted that the Hamburg Rules are designed to apply to international carriage, so national arrangements may continue to be made for Canadian coastal traffic. One option would be to extend the Hamburg Rules by statute to the coasting trade.

### References

Para. 1. The general scheme of Article VI is given in Payne and Ivamy's Carriage of Goods by Sea (11th ed.) (London, Butterworth's, 1979), at pp. 83-84. The purpose of Article VI is noted in W.E. Astle Shipping and the Law (London, Fairplay, 1980), at p. 228.

Para. 2. On the requirements in Article VI to avoid application of the Hague Rules, see Tetley, at p. 9. On the definition of "particular goods" see Payne and Ivamy, supra para. 1., at p. 84 and Astle, supra para. 1, at p. 229. On

non-negotiable receipts and Article VI note Scrutton, (18th ed.), at pp. 447-448 and Carver, (12th ed.), at para. 303. Provincial bills of lading legislation is identical in substance to the federal act, found at R.S.C. 1970, c.B-6.

Para. 3. Concerning public policy and seaworthiness, see Astle, supra para. 1, at pp. 231-233 and Scrutton, (18th ed.), at p. 447. In the Canadian case Tahsis Co. v. Vancouver Tug Boat (1965), 54 W.W.R. 395, (B.C.S.C.), at p. 414-415 the judge determined that clauses respecting seaworthiness in a contract were "not in harmony with Art.VI" and were invalid. One is left suspecting that the clauses were invalid as being against public policy.

Para. 4. On the "coasting trade" clause, see Payne and Ivamy's Carriage of Goods by Sea (10th ed.) (London, Butterworth's, 1976), at p. 75.

Para. 5. The application of the British Carriage of Goods by Sea Act 1971, 1971 c.19, (proclaimed in force 1977), is discussed in A. Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial L.Q. 225, at p. 262.

Para. 6. S. Mankabady, "Comments", at p. 45 makes note of the use of Article VI in the Ro-Ro trade. See the drafters decision to exclude reference to Article VI in Report of the Working Group (Sixth Session), UNCITRAL Ybk., Vol.V, 1974, at p. 120.

## D. HOW THE RULES APPLY

### Introduction

The Rules are intended to be exclusive codes of conduct between carriers and cargo owners. They provide a mandatory division of responsibilities and set minimum standards for their performance. An equally important objective of the Rules is uniformity of law in international trade. Nevertheless they have to mesh with other international legislation on shipping and related matters. How the Rules pursue these ends is discussed under the headings:

1. Exclusive Code
2. Interaction with Other Laws
3. International Uniformity

#### 1. Exclusive Code

##### Hague Rules: Article III (8)

Any clause, covenant or agreement in the contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

##### Article V para. 1

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

## Hamburg Rules: Article 23

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.
2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.
3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.
4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss or or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

## Summary

The obligations implied in a carriage contract by the Hague Rules are mandatory. They set an exclusive code of minimum standards that may only be increased by agreement of the contracting parties. Any attempt to reduce liability is invalid. However, in the absence of a penalty for such an attempt, some carriers use contractual clauses which apparently

disclaim their responsibilities and confuse cargo owners.

The Hamburg Rules will reinforce their minimum mandatory character by requiring a statement in the carriage agreement of their paramountcy, without derogation. Further they will impel a carrier to pay compensation for cargo losses caused by his attempt to derogate from the Rules or by his failure to include the statement of paramountcy. These penalties might be expected to reduce the use of invalid clauses and might even encourage the useful development of standard forms for carriage contracts.

#### Legal Commentary

1. The combined effect of Articles III (8) and V of the Hague Rules is to create a mandatory code whereby the carrier may increase his responsibilities and liabilities, but may not decrease them. The Rules are minimum standards. In spite of their obvious intent, these provisions have not protected carriers from including clauses in bills of lading that purportedly disclaimed their responsibility.

2. Such clauses understandably create uncertainty in the minds of shippers, with the following onerous effects: (1) the clauses mislead cargo interests, thus causing them to drop the pursuit of valid claims; (2) they present an excuse for prolonging discussion and negotiation of claims which otherwise might have been settled promptly; and (3) they encourage unnecessary litigation. As there is no prohibition on penalty



clauses, some carriers have used them to the confusion of shippers.

3. There has been some suggestion that the inclusion of such an invalid clause may void the bill of lading, even in respect of areas to which the Rules do not apply. However, if the disclaimer clause is made up of several parts, the courts may, under ordinary contractual principles, sever the offending segments from the valid ones.

4. Article 33 of the Hamburg Rules reiterate the principle of the Hague Rules that a carrier will not be allowed, directly or indirectly, to derogate from their minimum standards. Any attempts to do so will be treated as a nullity. Moreover, bills of lading will be required to contain a statement that "which nullify any stipulation derogating therefrom ... ." In addition, by subsection 4, where a cargo owner has incurred a loss as a result of inclusion of an invalid clause or the omission of the paramount statement, the carrier shall pay him compensation including his legal costs. While these new provisions will undoubtedly reduce the number of invalid clauses included in contracts of carriage, it is not clear how well the proposed penalties will work. These provisions may have the effect of promoting the introduction of standard forms for contracts of carriage. Such forms are already commonplace in international air, rail and road transit, and would be welcome in sea transport as well.

## References

Para. 1. Examples of the kinds of clauses that have been held invalid are exhibited in Carver, (12th ed.), paras. 277-279. M.J. Shah writes about carriers' use of disclaimer clauses in "The Revision of the Hague Rules on Bills of Lading Within the UN System - Key Issues", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at p. 24.

Para. 2. The effects are reported in Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 198-200.

Para. 3. The suggestion is made in Carver, (12th ed.), at para. 276 and in Scrutton, (18th ed.), at pp. 430-432, and revolves around the current interpretation of Svenska Tractor v. Maritime Agencies [1953] 2 Q.B. 295 and Renton v. Palmyra, [1956] 1 Q.B. 462.

Para. 4. These impacts are discussed by Shah, supra para. 3, pp. 23-25; S. Mankabady, "Comments", at p. 111; and W. Tetley, "Canadian Comments on the Proposed UNICTRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime L. and Comm. 251, at pp. 258-259.

## 2. Interaction with Other Laws

### Hague Rules: Article VIII

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of liability of owners of vessels.

### Carriage of Goods By Water Act: Section 7

Nothing in this Act affects the operation of sections 450 and 451 and sections 647 to 648, of the Canada Shipping Act, or the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

### Hague/Visby Rules: Article IX

This Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

### Hamburg Rules: Article 25

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants or agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.
2. The provisions of Articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.
3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damages:
  - (a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or
  - (b) by virtue of national law governing the liability

for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.
5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

#### Article 31

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention entered into force in respect of that State.
2. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.
3. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

## Summary

Even though the Hague Rules are mandatory, they are subject to local law on the limitation of ship's liability. In Canada, the Carriage of Goods by Water Act gives the Canada Shipping Act precedence to the extent it establishes a shipowner's maximum liability according to his ship's tonnage. If, in a particular case, this limit is lower than the limitation of cargo liability under the Hague Rules, it will prevail.

The growing number of international maritime conventions has made interaction with the Rules an increasing problem. The Hamburg Rules enlarge the principle of the Hague Rules by granting precedence to any national or international regulation of ship's liability. Following the lead of the Hague/Visby Rules, the Hamburg Rules also ensure that conventions creating exclusive liability for nuclear incidents will attach to a shipowner in their place. Generally, existing maritime conventions will prevail over the Hamburg Rules so that a state, party to an earlier treaty obligation, will not be impeded from acceding to the Hamburg Convention. However, the coexistence of the Hague, Hague/Visby and Hamburg Rules is not intended. The Hamburg Rules will supercede the others by a procedure for their denunciation.

## Legal Commentary

1. The combined effect of the Hague Rules, Article VIII, and the Canadian Carriage of Goods by Water Act, section 7, is to make the limitation of liability provisions of the



Canada Shipping Act paramount. Consequently the maximum limits of ship's tonnage under the Canada Shipping Act, rather than the individual limits per cargo package under Article IV (5), determine the ultimate liability limitation of a shipowner. Thus, where the ship's limitation figure under the Canada Shipping Act is lower than the sum of cargo compensation under the Hague Rules, the Act will prevent cargo owners from obtaining the full amount to which they are entitled by the Rules.

2. The Hague/Visby Rules refer particularly to the IMCO Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971. This convention, which entered into force on 15 July 1975, has not been signed or acceded to by Canada. The Convention ensures that the operator of a nuclear installation will be exclusively liable for damage caused by a nuclear incident. Hence the normal provisions on limitation of liability do not apply to the carriage of such materials. As Canada has not chosen to adopt the Convention, it would have no effect on the limitation of liability under the Hague/Visby Rules.

3. The objects of the Hamburg Rules Article 25 are two-fold: (1) to prevent the application of the Rules in the face of conventions about the liability for damage caused by nuclear incident; and (2) to relate the operation of the Rules to other maritime conventions. Regarding the first objective, liability for damage caused by a nuclear incident would not be regulated by the Hamburg Rules. As a result, states parties to



the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 1964, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, and the IMCO Brussels Convention relating to Civil Material, 1971 could become parties to the Hamburg Convention. In this respect, Article 25 follows the intent of the Hague/Visby Rules Article IX.

4. The second objective of Article 25 concerns potential conflicts between the Rules and other existing maritime conventions. The parties to a carriage contract could not be expected to fulfil contradictory rules of responsibility any more than states are likely to undertake conflicting treaty obligations presented by the addition of the Hamburg Convention. Therefore Article 25 was drafted so that the Rules will not interfere with the operation of existing mandatory conventions. In particular, the principle in the Hague Rules that the carrier's liability, apart from a nuclear incident, is ultimately limited by reference to the ship's tonnage liability is preserved by Article 25(1) of the Hamburg Rules notwithstanding Canada's proposal to the contrary. Similarly the loss of passengers' luggage to the extent it is already governed by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1971 is exempted from the Hamburg Rules by Article 25(4).

5. Article 31 makes clear that the Hamburg Rules will supercede the Hague and the Hague/Visby Rules and sets out the procedures which contracting states must undertake to meet this

end.

### References

Para. 1. For a similar analysis see Carver, (12th ed.), at para. 305 and Scrutton, (18th ed.), at p. 448. Article IV (5) is discussed infra in Chapter III.G.

Para. 2. The information may be found in IMCO Status of Multilateral Conventions and Instruments in Respect of which the Inter-Governmental Maritime Consultative Organization or its Secretary-General Performs Depositary or other Functions as at 31 December 1979, at pp. 169-71; IMCO, Status of the IMCO Convention and Amendments thereto and of Multilateral Conventions and Instruments in Respect of Which the Inter-Governmental Maritime Consultative Organization or its Secretary-General Acts as Depositary as at 19 October 1980. See also: Jan Schneider, World Public Order of the Environment (Toronto University of Toronto Press, 1979), at p. 169.

Para. 3. The objects are expressed in Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol.IV, 1975 at p. 229 and commented on by S. Mankabady, "Comments", at p. 112.

Para. 4. Canada's proposal is referred to in the United Nations Conference on the Carriage of Goods by Sea: Official Records A/Conf.89/14, (New York, 1981), at p. 67. The reference in Article 25(2) to conventions dealing with matters within Articles 21 and 22 concern issues of court jurisdiction and arbitration which are discussed in Chapter V.C and D.

### 3. International Uniformity

#### Hamburg Rules: Article 3

In the interpretation and application of the provision of this Convention regard shall be had to its international character and to the need to promote uniformity.

#### Summary

Although uniformity of rules in international carriage was a prime object of the Hague Rules, they did not expressly state it. On occasion, national courts in applying the Rules, have lost sight of this objective. The Hamburg Rules include a precatory clause that will bring their international, uniform character into the express consideration of all national authorities.

#### Legal Commentary

1. The Hague Rules do not contain specific directions that the interpretation and application of their provisions must be carried out with regard to the need to promote uniformity although this is their obvious intent. However, different modes of incorporation of the Rules into national legal systems. has contributed to divergencies in their application. The Hamburg Rules seek to overcome this obstacle by the inclusion of Article 3 reminding all national authorities who will have to apply them that they have a uniform, international character.

2. The effect that Article 3 will have in practice is

impossible to determine. Canadian courts could be expected to entertain submissions by counsel which contain reference to foreign precedents. Since they already consider decisions of other Commonwealth, American and French courts when they interpret the Hague Rules, it is not likely that Article 3 will have much impact on the way in which they would interpret the Hamburg Rules.

#### References

Para. 1. The differing effects of national incorporation are discussed in S. Mankabady, "Comments", at pp. 45-49.

## CHAPTER III    RESPONSIBILITIES OF CARRIERS

### Introduction

The principle purpose of the Rules is to establish a division of responsibilities between the carrier and the cargo owner for the safe carriage of the goods. The parties' freedom to agree upon the terms of carriage is severely restricted. Instead, nearly all aspects of the carriage are regulated by law. Thus, the Rules set standards for the documents, the ship, the cargo and the voyage. This and the next chapter divide the consideration of these legal standards as they affect carriers or cargo owners. In this chapter the responsibilities of carriers are discussed under the following headings:

- A. Bills of Lading
- B. Seaworthiness of Ship
- C. Care of Cargo
- D. Exclusion of Liability
- E. Deviation
- F. Delay
- G. Limitation of Liability

A. BILLS OF LADING

Hague Rules: Article III (3), (4), (7)

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things,
  - (a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
  - (b) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
  - (c) the apparent order and condition of the goods provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.
4. Such a bill of lading shall be prime facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c).
7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.



## Carriage of Goods by Water Act: Section 6

Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

## Hague/Visby Rules: Article III (4)

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

## Hamburg Rules: Article (7)

"Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

## Article 14

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.
2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.
3. The signature on the bill of lading may be in handwriting printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

## Article 15

1. The bill of lading must include, inter alia, the following particulars:
  - a. the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;
  - b. the apparent condition of the goods;
  - c. the name and principal place of business of the carrier;
  - d. the name of the shipper;
  - e. the consignee if named by the shipper;
  - f. the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
  - g. the port of discharge under the contract of carriage by sea;
  - h. the number of originals of the bill of lading, if more than one;
  - i. the place of issuance of the bill of lading;
  - j. the signature of the carrier or a person acting on his behalf;
  - k. the freight to the extent payable by the consignee or other indication that freight is payable by him;
  - l. the statement referred to in paragraph 3 of article 23;
  - m. the statement, if applicable, that the goods shall or may be carried on deck;
  - n. the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
  - o. any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.
2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of lading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in

a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

#### Article 16

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or other such person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.
2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.
3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:
  - a. the bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and
  - b. proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.
4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

## Summary

Carriage law distinguishes between a "received for shipment", and a "shipped", bill of lading. The former is given to the shipper after the carrier has received the cargo for carriage. It operates as a receipt for the goods and as evidence of the contract for the carriage. It may also limit the carrier's responsibilities because the mandatory standards of the Hague Rules do not operate before loading. As soon as the cargo is loaded, the shipper may demand the issue of a "shipped" bill in place of the "received" one.

As a receipt, the bill of lading provides evidence about the cargo. In particular, a shipped bill is proof that the cargo is on board and that the Hague Rules operate upon it. Under the Rules, a "clean" bill must show the leading marks and apparent condition of the cargo as well as the number, quantity or weight of the goods. If the carrier doubts the accuracy of any of these details supplied by the shipper or cannot check them, he may reserve his position by "clausing" the bill. While the evidence of the bill may be rebutted by the carrier in an action by the shipper, under Canadian law it is conclusive proof in the hands of the consignee. The Hague/Visby Rules will confirm the Canadian law in this respect.

The Hamburg Rules elaborate the same principles. Information on the bill of lading will be good evidence in the hands of the shipper, and conclusive proof by the consignee,

against the carrier. The Hamburg Rules will add to the list of details required in the bill of lading as evidence about the cargo. They will also demand statements about two new matters. Any freight payable by the consignee will have to be noted so as to give him notice of the claim. The ports of loading and discharge will have to be named as they may determine whether the Hamburg Rules will apply. The carrier's power to clause the bill with reservations is reiterated.

It is clear that if the carrier should fail to note the condition of the goods on the bill of lading they will be deemed to have been received or shipped in good condition, and if he does not include a statement of any freight payable the consignee may presume there is none due. But the consequences of omission of other information required by the Hamburg Rules is unclear and some difficulties may occur where the carrier does not make any relevant reservations.

### Legal Commentary

1. As already discussed, the application of the Hague Rules is dependent on the issuance of a bill of lading, or at least on the presence of a contract of carriage which is intended to be covered by one. Then the Hague Rules will begin to operate from the moment loading begins. The bill of lading, an undefined term in the Hague Rules, acts as a receipt for the goods, as a document of title and as evidence of the contract of carriage. In most carriage transactions, however, the bill of lading is the crucial document and so the Hague Rules, in



Articles III (3), (4) and (7), establish some rules regarding a carrier's responsibilities for it.

2. From Article III (7) it is apparent that the carrier may issue two types of bills of lading, one labelled "received for shipment" and the other "shipped". The "received for shipment" bill of lading is given prior to the goods actually being placed on the vessel, but after having been received by the carrier according to the first phrase of Article III (3). Since the Hague Rules apply only from tackle-to-tackle, the "received for shipment" bill of lading may contain clauses that exculpate the carrier from responsibility for the cargo prior to loading. The chief advantage of a "received for shipment" bill of lading is that it can be sent to the consignee prior to the loading of the goods. The "received for shipment" bill of lading can be used as evidence of the contract of carriage regardless of whether the goods are shipped, although there is considerable doubt whether the document itself is subject to the Hague Rules. By Article III (7), after loading, the shipper can demand a "shipped" bill of lading upon return of the "received for shipment" bill, or the carrier may note the name of the vessel upon which the cargo has been shipped and the date of shipment on the "received for shipment" bill which will thereby become a "shipped" bill of lading.

3. By Article III (3), the shipper may demand from the carrier a bill of lading which shows the leading marks and the number or quantity or weight of the goods as furnished by the shipper, and the apparent order of the cargo. When he has



reasonable grounds for doubt, the carrier may include reservations or refuse to include shipper's information in the bill of lading. The purpose of this section, when coupled with Article III (4), is to provide the consignee with a bill of lading which operates as an effective receipt for the goods.

4. The carrier is only obligated to issue a bill of lading when it is demanded by the shipper, but then the bill that is issued must comply with Article III (3). Where a bill of lading does not comply with Article III (3) and the shipper makes no complaint, the consignee and the shipper are governed by the actual terms of the bill. It should be noted that it is only the shipper and not the consignee that can demand the bill of lading. However, it may be argued that by the Bill of Lading Acts the consignee replaces the shipper and can, therefore, demand a bill of lading that complies with Article III (3).

5. As to the contents of the bill of lading, Article III (3) (a) indicates that the carrier must note on the bill the leading marks necessary for identification as furnished by the shipper provided the marks are clear and will remain so throughout the journey. Paragraph (b) requires the bill to indicate, "either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper." This clause is in the alternative and, therefore, the carrier need only put one of them in the bill of lading. Whether, in cases where the bill of lading contains more than one particular, the carrier is bound by all of them

has not been tested directly in Canadian or British courts, and is open to good arguments on both sides.

6. The general proviso to Article III (3) provides that the carrier need not accept the particulars regarding marks, number, quantity or weight provided by the shipper where the carrier has reasonable grounds for suspecting the accuracy of the particulars or where there is no reasonable means of checking them. Read literally, the proviso in Article III (3) merely authorizes the carrier to omit from the bill of lading certain statements supplied by the shipper. However, it is common practice for carriers to include all the statements presented by the shipper and then make reservations about their accuracy. It has been argued that instead of making reservations, the carrier should not include the statements, which he doubts, in the bill of lading. The present practice, it is asserted, is contrary to the wording of the proviso to Article III (3) so that the carrier's reservations are a form of non-responsibility clause which is invalid under Article III (8) of the Hague Rules. The leading British case, however, indicated clearly that such reservations are valid and will be given effect even where no reason for the reservation is given, with the result that the carrier is not bound by the particulars to which objection is made. In a recent Canadian case, the bill of lading contained information on the number of lifts and pieces and weight. The bill of lading had superimposed on it a statement that the cargo was "said to contain" a certain number of pieces of a certain weight and

that the lifts had been unchecked. The shipment arrived with pieces missing from several of the lifts. The court reviewed the relevant cases indicating that the reservation decisions dealt mostly with condition or weight, and not easily enumerated items. The court held that the carrier could "have availed itself of the concluding clause of Article III (3) by refusing to state in the bill of lading the number of pieces in the lift". Having mentioned them, the carrier could not relieve itself of responsibility by stamping a clause on the bill of lading "said to contain indicated number of pieces". This case would appear to support the position that Article III (3) must be read literally and reservations should be not considered valid.

7. Under Article III (3) (c) the carrier is obliged to show the "apparent order and condition of the goods". His statement does not depend on the shipper, and, it appears, must be made in all cases. The carrier need only describe the condition of the goods as is ascertainable on a reasonable inspection, unless he has knowledge that they are damaged and a clean bill of lading should not issued. Where containers or packaging cover the goods, the carrier need only inspect the containers and packing.

8. Article III (4) indicates that the information in the bill of lading is prima facie evidence of receipt of the goods that can be rebutted. Where an innocent, subsequent holder of the bill of lading relies on a statement of fact in the bill of lading to his detriment, the statement amounts to

an estoppel against the carrier. Section 4 of the Canadian Bills of Lading Act ensures that a bill of lading is conclusive evidence in the hands of a consignee or endorsee for value against the master or person signing the bill of lading. Although it has not been directly decided, it is reasonably to be presumed that, since the master's signature normally binds the carrier, section 4 would also make the bill of lading conclusive evidence against the carrier. In a case where the bill of lading indicated that the goods were in apparent good order and condition but upon arrival they were, in fact, found to be damaged, the consignee could rely on the bill of lading as prima facie or conclusive evidence against the carrier.

9. Although a master signs a bill of lading on behalf of the carrier, it is doubtful whether he, or the signing agent, can bind the carrier where goods described in the bill were never in fact shipped. This uncertainty is eliminated by the Hague/Visby Rules Article I (1) which indicates that the information in the bill of lading pursuant to Article III (3) is conclusive evidence against the carrier once the bill of lading has been transferred to a third party. This clause would create a new statutory kind of estoppel against the carrier that would go beyond the present law because there would no longer appear to be any need for the third party to have acted on the false statement to its detriment. The third party, which could not include a consignee to whose order a bill of lading was directly issued since there would be no transfer, must have no actual notice that the goods shipped did not

correspond to their bill of lading description. This clause would strengthen the position of the third party even more than the Bills of Lading Acts, although the prima facie rule still applies where the shipper is involved.

10. By section 6 of COGWA, when bulk cargo is weighed by someone other than the carrier or the shipper and this fact is stated in the bill of lading, its weight as stated in the bill of lading is not prima facie evidence against the carrier. This section acts to protect the carrier in cases where there is no reasonable means of checking the accuracy of the third person's calculation and weight is the only particular under Article III (3) (b) that is possible. In the British Carriage of Goods by Sea Act of 1971 this section was repealed, thus leaving the carrier to exclude a statement about weight where there is no reasonable means of checking it. It is unclear what a court would do where a bill of lading stated the weight of the cargo and that it was ascertained by a third party.

11. The first problem faced by the drafters of the Hamburg Rules concerning the carrier's responsibilities for the contents and issuance of a bill of lading was the lack of a definition of a bill of lading under the Hague Rules. It is clear that the bill of lading will no longer be as crucial to the application of the Hamburg Rules as it is to the Hague Rules, but it will still be the most widely used carriage document. The definition in Article 1 (7) was devised while considering the contents of the bill and its evidentiary effect (Articles 15 and 16). The key element in the definition is to



be the negotiable character of the bill, thus indicating that the "straight" or non-negotiable bill of lading, which is not in wide use in international trade, will not be a bill of lading under Article 1(7).

12. Article 14 and 15 (2) adopt the same system as existed under the Hague Rules in regard to "shipped" and "received for shipment" bills of lading. The carrier's responsibility will commence from the time he takes charge of the goods (Article 4 (1)) and it will be at this time that the shipper may demand a bill of lading. Article 14 (2) will eliminate any problem regarding carrier responsibility for the contents of the bill of lading by treating the master's signature as an acknowledgement by the carrier. Article 15 (2) will allow for "shipped" bills of lading after the goods have been loaded, similar to Article III (7) of the Hague Rules. This "shipped" bill of lading is regularly required where letters of credit are used.

13. Article 15 (1) contains fifteen paragraphs indicating the minimum particulars that will have to be included in a bill of lading. Two changes exist from the required information under Article III (3) of the Hague Rules. First, both the quantity and the weight of goods will have to be indicated on the bill and not the quantity or weight as is in the Hague Rule Article III (3) (b). Secondly, the apparent condition of the goods, because of their definition in Article 1 (5) will now include the apparent condition of the packaging and containers. Article 15 (1) (c) will require the name and



principal place of business of the contracting carrier but not the actual carrier. This provision, and (f), (g) and (i) regarding the ports of loading and discharge and the place of issuance of the bill of lading will be used to determine the applicability of the Hamburg Rules under Article 2. Two other provisions of interest are paragraphs (e) and (k). Paragraph (e) indicates that the consignee, if named by the shipper, will have to be added to the bill of lading. If the consignee is so named and is fixed, the document will no longer be negotiable and will not be treated as a bill of lading as defined in Article 1(7), thus creating a problem of inconsistency in the Rules. A better interpretation would ensure that the consignee's name required by (e) would not be fixed so that the document will retain its negotiable character. Paragraph (k) will require that the freight to be payable by the consignee must be included in the bill of lading. The UNCTAD Secretariat argued that a reference to demurrage should be included in this paragraph since it is important to the consignee to know if the demurrage charges have been paid. This insertion of demurrage was especially urged in light of Article 16 (4).

14. Article 15 (3) makes clear that the absence of required information will not bring about a sanction against the carrier, although it may affect the evidentiary value of the bill of lading as noted in Article 16 (2) and (4). The multiple requirements of Article 15 (1) have been criticized as only complicating commerce and not really helping protect the consignee. The criticism may especially be true of the

requirement for quantity and weight to be inserted. The provisions respecting reservations and the ability to avoid using bills of lading may ease some of the potential problems.

15. The Hamburg approach to reservations inserted in the bill of lading is intended to reflect commercial practice. The carrier will have to include in the bill all the statements furnished by the shipper concerning the general nature, leading marks, quantity and weight but may then add reservations. They are to be added only when there are reasonable grounds for suspecting the accuracy of the particulars or the carrier has no reasonable means of checking the particulars. The UNCITRAL Draft of Article 16 (1) indicated that the reservation made by the carrier had to contain specific reasons for the reservation, so that general reservations would not become common. Article 16 (1), however, will not require this degree of specificity. It merely indicates that the reservation will have to specify the inaccuracy, the grounds of suspicion or the absence of a reasonable means to check the cargo. This language is an improvement over the Hague Rules Article III (3), but it will remain for national law to determine the precise meaning and effect to be given to it. Canada has observed that it is unclear what sanctions would be levied against the carrier where there was no compliance. The drafters of the Hamburg Rules decided that there was no need to draft special rules to deal with bulk cargo and containers since Article 16 (1) would be sufficient to include the necessary reservations. Although it was suggested, no clause

was added preventing carriers from inserting a reservation when they suspect inaccuracies unless there have been reasonable means employed to check the information.

16. Article 16 (2) provides that if the carrier should fail to note the apparent condition of goods on the bill, the goods will be deemed to have been in apparent good condition. There was widespread agreement with this provision which was seen as underscoring the duty of the carrier to check the condition of the goods and to disclose damage and defects. Although this Article and 16 (4) were designed to deal with omissions of information in bills of lading, they cover only some of the requirements of Article 15 (1) and 16 (1). The Hamburg Rules may create difficulties where required information is not included in the bill of lading and no reservations are made. Will the carrier be bound by information that is not indicated on a bill? What will be the effect of a bill that expresses weight but not quantity, or vice versa, and no reservation is present? What will be the position of a general reservation such as "weight unknown" or "said to contain", where no more specific information is given? Will the cargo owner have the burden of showing that the inaccuracies in a bill should reasonably have been located by the carrier? There is even doubt how much the uncertainties will matter when considering the evidentiary provisions of Article 16 (3).

17. Article 16 (4) will give to the consignee the benefit of a presumption against claims for freight or

demurrage when there is no such notation on the bill of lading. The presumption will be only prima facie, and the carrier will be able to introduce evidence regarding freight or demurrage once the bill of lading is transferred to a consignee. Article 15 (1) (k) will require the bill of lading to include statements on freight, but not on demurrage, as was urged by the UNCTAD Secretariat.

18. Article 16 (3) contains the rules regarding the evidentiary effect of bills of lading. It follows the Hague/Visby Rules Article III (4) in that the bill of lading will be prima facie evidence of the goods described in the bill and proof to the contrary will not be admissible against a third party, including a consignee, who in good faith acts in reliance on the description of the goods in the bill. Two comments can be made on Article 16 (3). First, by including the consignee as a third party it may eliminate the problem concerning transferability previously mentioned. Secondly, for the estoppel in Article 16 (3) to operate the consignee will have to show that he relied on the statement in the bill of lading, though whether to his detriment is unclear. This requirement is slightly more onerous than the Hague/Visby Rules Article III (4). It should be noted that these rules will not apply to non-negotiable documents described in Article 18.

19. From Article 16 the evidentiary effect of the bill of lading against the contracting carrier will be established. This evidentiary effect against the contracting carrier will apply where the bill of lading is issued by the actual carrier.

It is argued that the statements made about the goods by an actual carrier, where there is a transshipment, must be regarded under Article 10 (1) as "acts and omissions" in "relation to the carriage performed by the actual carrier" for which the contracting carrier is liable.

### References

Para. 2. On "received for shipment" bills of lading, see S. Mankabady, "Comments", at pp.83-84; Tetley, at p.72; W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at pp.40-41; and Scrutton, (18th ed.), at pp.425-426 and 429. There is some doubt as to whether a "received for shipment" bill of lading has to comply with Article III (3), see Astle, *supra*, at p.41 and Scrutton, *supra*, at p.425-426, although in practice it seems that the "received for shipment" bill would comply with Article III (3).

Para. 4. The analysis of the problem when a bill of lading is issued but not demanded is found in Carver, (12th ed.), at para. 270. The leading case is the A.G. of Ceylon v. Scindia Steam Navigation Co. [1961] 2 Lloyd's Rep. 173; [1962] A.C. 60; [1961] 2 W.L.R. 936; [1961] 3 All E.R. 684 (Pr.Co.) where it was held that the shipper could have demanded an unqualified bill of lading that complied with the Hague Rules, but since no demand was made the shipper-consignee was bound by the bill of lading that was issued. Note should also be made of Canada and Dominion Sugar Co. v. C.N. (W.I.) SS. Ltd. (1946), 80 Lloyd's L.R. 13; [1947] A.C. 46 (Pr.Co.).

Para. 5. On Article III (3) (a) and (b), especially concerning the arguments as to whether a carrier should be bound by all the particulars listed in the bill under paragraph (b), see Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1975, at pp.207-208. Tetley, at p.105, is of the opinion that the carrier would be bound by all the particulars, as is S. Mankabady, "Comments", at p.85.

Para. 6. On the Article III (3) proviso generally, see the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol.VI, 1975, at p. 209 and Astle, *supra* para. 2 at p. 48. Concerning the validity of reservations, see Astle, *supra* at pp. 42-43; Scrutton, (18th ed.) at p. 426 and S. Mankabady, "Comments", at p.87. Tetley, at pp. 106-111 argues that reservations should not be held as valid. The leading British



Case is A.G. of Ceylon, supra para. 4 and, see also Pendle and Rivett Ltd v. Ellerman Lines Ltd. (1927), 29 Lloyds L.R. 133. These cases are discussed in Astle, supra, at pp. 42-43 and Tetley, at pp. 107-108. The Canadian case is Coutinho, Caro and Co. v. The Ermua [1979] 2 F.C. 528 (Fed. Ct. T.D.).

Para. 7. On paragraph (c), see Astle, supra para. 2, at pp. 44-48 and the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at p. 208.

Para. 8. The case about estoppel on the bill of lading is Silver v. Ocean SS. Co. [1930] 1 K.B. 416; 35 Lloyds L.R. 48, and see also Scrutton, (18th ed.), at p. 426 and Tetley, at pp. 101 and 103. Concerning section 4 of the Canadian Bills of Lading Act, R.S.C. 1970, c. B-6, see Tetley, at pp. 101-103. It was held in Canada and Dominion Sugar, supra para. 4, that for a shipper-consignee to establish estoppel against a carrier the statement relied upon must be clear and unqualified. In Westcoast Food Brokers v. The Hoyanger (1979), 31 N.R. 82 (Fed. Ct. A.D.) a clean bill of lading was issued where inspectors appointed by the carrier indicated apples would not spoil during the journey. The court rejected a plea of estoppel on the grounds that the inspectors were inexperienced and used Argentinian and not Canadian standards, none of the ship's crew were capable of properly interpreting the inspectors' report, and the carrier had every reason to believe the goods were in apparent good order and had acted properly in executing the bill of lading.

Para. 9. The best discussion of the effects of Hague/Visby Rules Article 1(1) is in A. Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial L.Q. 225, at pp. 253-254 and, see also Astle, supra para. 2, at pp. 49-50; Tetley, at pp. 116-117; and the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at pp. 212-213.

Para. 10. Section 6 is noted by Tetley, at p. 111. Concerning the deletion of section 6 in the English Carriage of Goods by Sea Act 1971, see Diamond, supra para. 9, at p. 254, fn. 80.

Para. 11. Concerning the definition of bills of lading and the Hamburg Rules generally, see the Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at p. 157 and the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at pp. 205-206. On Article 1(7), see Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods By Sea (Part IV)" (1976), 7 J. of Maritime L. and Comm., 615, at p. 634 and D.E. Murray, "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at p. 73.

Para. 12. On "received for shipment" and "shipped" bills of



lading in the Hamburg Rules, see S. Mankabady, "Comments", at p. 84; Murray, supra para. 11, at p.74 and the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at p. 212.

Para. 13. The requirements in Article 15(1) are discussed in S. Mankabady, "Comments", at pp. 85-86; the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at pp. 207-212; Report of the Working Group (Seventh Session), UNCITRAL Ybk., Vol. VI, 1975, at pp. 190-192 and Report of the Working Group (Eighth Session), UNCITRAL Ybk., Vol. VI, 1975, at p. 240. Comments on the effect of paragraph 3 are from Murray, supra para. 11, at p. 73. On the inclusion of demurrage in Article 15(1)(k) see, "Bills of Lading - Comments on the Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation and Shipping", U.N. Doc. TD/B/C.4/ISL/19, 30 October 1975, at p. 37 and "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea adopted by the United Nations Commission on International Trade Law (UNCITRAL)", U.N. Doc. TD/B/C.4/ISL/23, 18 June 1976, at p. 24.

Para. 14. Concerning the lack of sanction in Article 15(3), see Murray, supra para. 11, at p. 74 and Report of the Working Group (Seventh Session), UNCITRAL Ybk., Vol. VI, 1975, at p. 192. The criticisms are made by Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Commercial L.Q. 1, at p. 12.

Para. 15. The basic principles in Article 16(1) were decided in the Report of the Working Group (Seventh Session), UNCITRAL Ybk., Vol. VI, 1975, at pp. 192-193. Concerning the degree of specificity of reservations, see the Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at p. 209; Sweeney, supra para. 11, at pp. 645-653 and Report of the Working Group (Eighth Session), UNCITRAL Ybk., Vol. VI, 1975, at p. 241. Canada's comments are in UNCITRAL Ybk., Vol. VII, 1976, at p. 210. The decision on bulk cargo and containers is in Report of the Working Group (Seventh Session), at p. 193, and see also, the Fourth Report of the Secretary-General, at p. 210. The suggestion that no reservation should be added unless reasonable checking has been done is in "Bills of Lading - Comments on the Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation and Shipping", U.N. Doc. TD/B/C.4/ISL/19, 30 October 1975, at p. 37.

Para. 16. On Article 16(2), see Report of the Working Group (Seventh Session), UNCITRAL Ybk., Vol. VI, 1975, at p. 194 and S. Mankabady, "Comments", at p. 88.

Para. 18. Concerning non-negotiable bills of lading and

Article 16(3), see Murray, supra para. 11, at pp. 75-76 and S. Mankabady, "Comments", at p. 88. Generally on 16(3), see Tetley, "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime Law and Commerce 251, at p. 258.

Para. 19. The comments in this paragraph are from Erling Selvig, "Through-Carriage and On-Carriage of Goods by Sea" (1970), 27 American Journal of Comparative Law 369, at p. 382.

B. SEAWORTHINESS OF SHIP

Hague Rules: Article I (d)

"ship" means any vessel used for the carriage of goods by water;

Article III (1)

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to, (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article IV (1)

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

Carriage of Goods by Water Act: Section 3

There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Hamburg Rules: Article 5 (1)

The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

## Summary

The absolute obligation on a carrier to ensure his ship is seaworthy was removed by COGWA. In its place the Hague Rules demand a standard of due diligence to make the vessel seaworthy, which cannot be contractually disclaimed. Seaworthiness is more than a sound hull. It also involves the provision of a properly manned, supplied, equipped and cargoworthy ship. These standards are not fixed but rise relative to the development of marine technology.

Under the Hague Rules, seaworthiness is a duty before the voyage only. Since it is an overriding obligation, the carrier cannot excuse himself through exceptions in the Rules unless he has first proved that he exercised the necessary diligence towards the ship. However, when a cargo is lost or damaged, its owner must normally establish the cause, such as unseaworthiness of the ship. Then the carrier only has to show that he exercised due diligence in relation to that cause.

The standard of diligence required is roughly equivalent to reasonable care in light of the circumstances known, or fairly to be expected, about the particular voyage and the cargo. The carrier is responsible for his own acts and omissions and those of anybody he hires to make his ship fit. He may not in law rely upon the work of others. This vicarious responsibility does not extend to work on the vessel before the carrier owns it, such as her design and construction, unless he had a part in it.

There are two major defects in these provisions of the Hague Rules. First, seaworthiness is required before the voyage but not throughout it, and secondly, the onus of proof of unseaworthiness is ambiguous and unfairly difficult for the cargo owner. The Hamburg Rules will overcome both defects while reinforcing in positive terms, the principles of the Hague Rules.

The Hamburg Rules express the carrier's liability much more broadly: he will be liable for the loss of cargo in his charge unless he can prove he took "all measures that could reasonably be required". The new phraseology for fault is not expected to change the standard understood by due diligence. Thus, the cargo owner will only have to demonstrate damage to his goods while in the carrier's charge. Liability will immediately fall on the carrier unless he can show that he took all reasonable measures to provide a seaworthy ship both before and during the voyage.

These changes will considerably improve the cargo owner's chances of recovery for injury to his goods in disputed circumstances. There is some risk that old caselaw may be used to interpret the new Rules and thus reintroduce discarded distinctions. For instance, Common Law decisions distinguishing independent contractors may permit the carrier to escape responsibility for their work for him.

#### Legal Commentary

1. Prior to the Hague Rules there was an obligation on



the carrier to make the vessel seaworthy that was absolute. This obligation could, however, be avoided through specific language in the contract of carriage. Section 3 of COGWA provides that when the Hague Rules apply there is no absolute obligation on the carrier to provide and maintain a seaworthy vessel. Under the Hague Rules, Articles III (1) and IV (1), the carrier has to show he exercised due diligence to make the vessel seaworthy. Although there appears to be a lower standard of responsibility on the carrier under the Hague Rules, the obligation can no longer be avoided by express provisions in the bill of lading.

2. Articles III (1) and IV (1) are usually referred to as the seaworthiness articles. It should be noted, however, that there are additional responsibilities on the carrier to provide a properly manned, equipped, and supplied ship and to make the vessel cargoworthy (for the cargo being carried). Unless the context indicates otherwise, the discussion of seaworthiness is equally applicable to these other requirements found in Article III (1) (b) and (c).

3. Article III (1) states that due diligence to make the vessel seaworthy must have been exercised "before and at the beginning of the voyage". In the leading Canadian case on this phrase, prior to the vessel commencing its voyage, fire destroyed the cargo that had been loaded on board. The fire was attributable to a lack of due diligence and the Court found that from the time the fire started the vessel was unseaworthy.



In considering the phrase "before and at the beginning of the voyage", the Court determined that it must mean the entire period from at least the beginning of the loading until the vessel starts on her voyage. The voyage in question is the contractual voyage from the port of loading to the port of discharge as stated in the bill of lading, with the result that a vessel must be seaworthy in relation to each piece of cargo covered by a bill of lading, even where the cargo is loaded far from the first port of loading. In the case where storm valve cover plates were stolen at an intermediary port it was determined that the vessel had been seaworthy at the beginning of the voyage and that there was no requirement for the carrier to maintain seaworthiness after the voyage had begun.

4. Conflicting opinions have been expressed on when a voyage in fact begins. It has been argued that the vessel is beginning its voyage when, at the port of loading, the hatches are battened down, visitors put ashore, and the vessel commences movement. Alternatively, it has been argued that the beginning of the voyage can be at some point after the vessel has left the port of loading where the action necessary to make her seaworthy is reasonably simple and is commonly postponed until she is underway. Two situations in particular are envisioned in permitting seaworthiness to be completed at sea: the case where the loading may be a river port, and the case of liners collecting goods prior to the main voyage. A restricted interpretation of the beginning of the voyage, it is argued, would lead to unnecessary complications and abandonment of

common practices. Against the proposition that the voyage may begin at sea, it is argued that this creates uncertainty and is contrary to Article III (1).

5. Article III (1) is considered an overriding obligation upon the carrier with the result that he must first prove that due diligence was exercised in making the vessel seaworthy before he may exculpate himself through the use of the exceptions found in Article IV (2). The prevailing opinion is that when there is damage to goods the cargo owner must show that there was unseaworthiness and that the damage resulted from this unseaworthiness. This burden on the cargo owner is usually discharged by showing that the goods arrived damaged where there was a clean bill of lading. Courts normally call on both parties to provide all the information available to them and the incursion of seawater is usually prima facie evidence of unseaworthiness. Where a case of unseaworthiness is made out, it is then upon the carrier to show that due diligence was exercised to make that vessel seaworthy before and at the beginning of the voyage.

6. Due diligence has been equated to: the common law duty of care; reasonable diligence having regard to the circumstances known, or fairly to be expected, and to the nature of the voyage, and the cargo to be carried; and as a genuine, competent and reasonable effort to fulfill the carrier's obligations. The exercise of due diligence is a question of fact, of which the carrier must provide actual proof. This proof goes beyond the carrier and requires due

diligence of servants, agents, and independent contractors employed to make the vessel fit. It is not sufficient that the carrier show that competent men were hired for the job. The men so hired must exercise due diligence in their tasks. In the leading British case an independent contractor, after a Lloyd's survey, negligently replaced an inspection cover to a storm valve. During the voyage, water entered the hold damaging the cargo. The Court found that the obligation of due diligence was to be exercised by the person performing the work. The workman was negligent and therefore the carrier was liable because due diligence to make the ship seaworthy could not be shown. In another British case, the carriers were deemed to have exercised due diligence when they employed competent people and these people acted carefully and competently and chose an acceptable method of inspection, even though another method would have found the flaw that led to the damage to the cargo.

7. The carrier's responsibilities do not begin until the vessel is under his care and control, with the result that the carrier cannot be responsible for defects in building or design in a vessel that are not detectable by due diligence, unless the carrier had some part in the construction of the ship. The obligation on the carrier is to exercise due diligence to "make" the vessel seaworthy. This distinction allows the carrier to avoid liability for undetectable defects in the construction and design of the vessel, although he is responsible for her maintenance and for due diligence in

carrying it out. In cases where a vessel has been purchased, a court would be likely to accept a surveyor's certificate that the vessel was seaworthy at the time of acquisition. The production of such a certificate in the regular course of ownership is not considered sufficient to prove due diligence or the seaworthiness of the vessel.

8. Generally,

"(s)eaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage."

The determination of seaworthiness is a question of fact in every case. There are a number of prime considerations that must be taken into account when establishing the fact. The vessel must be fit from the point of view of design, and the condition of her equipment and hull. The vessel must be adequately manned with qualified officers. The vessel must be properly supplied with the essentials of navigation. The vessel must be properly maintained and the machinery must be fit and proper to ensure safety. One interesting problem that has not yet faced British or Canadian Courts concerns the effect of electronic aids to navigation on the standards of seaworthiness. American jurisprudence has concluded that, as yet, a vessel cannot be considered unseaworthy just because she does not have electronic navigational aids. But where a vessel had the electronic aids, but they were not in working order

because of a lack of due diligence to maintain them, she was held to be unseaworthy. There are some Canadian and British cases regarding failures to provide navigational charts and pilotage information and others in which the crew has been improperly instructed on the use of vessel equipment. These cases could be extended to cover situations where electronic aids are present but not used or in a state of disrepair. It is just a matter of time before a failure to carry electronic navigational equipment will make certain classes of ships, if not all vessels, unseaworthy. The question of electronic aids to navigation shows that the requirements for seaworthiness are not static, but evolve as technology and knowledge improves. Article III (1) . (b) reflects the dynamic character of seaworthiness by its requirement that the carrier "properly" equip the vessel.

9. Article III (1) (b) requires the vessel to be properly manned. That is not just fully crewed, but manned with a competent master and officers. The shipowner cannot rely on certificates of competence, but must determine personally the competence of the crew. In the leading British case the Court held that the inefficiency of the engineers made the vessel improperly manned, since the carrier would have noted this inefficiency had he exercised due diligence toward manning. Article III (1) (b) also requires the vessel to be properly supplied. This obligation refers to adequate stores and bunkers, as well as adequate plans of the vessel, and suitable charts and navigational equipment. Where the vessel



cannot carry sufficient bunkers for the contemplated voyage, it is now sufficient if arrangements for future bunkers have been made prior to the commencement of the contractual voyage.

10. Article III (1) (c) requires the vessel to be fit for the reception, carriage and preservation of the cargo. This provision has been referred to as requiring the carrier to make the vessel cargoworthy. It should be noted that damage to cargo that might be attributable to unfitness of the vessel may also be attributable to a failure to care for the cargo pursuant to Article III (2). The carrier must ensure that the vessel is ready and capable of stowing and carrying the cargo presented to it. While the hull of his ship may be seaworthy, the carrier must also ensure she is cargoworthy, or at least that he exercised due diligence to make her so.

11. The carrier does not have to prove that due diligence was exercised in relation to all the elements of Article III (1). The carrier need only show that he was diligent in relation to the contributing causes of damage.

12. Two major defects in the seaworthiness articles of the Hague Rules were considered by the drafters of the Hamburg Rules. The first concerned the fact that the requirement to make the vessel seaworthy did not continue throughout the entire voyage. Secondly, it was perceived that the burden of proof regarding seaworthiness was ambiguous and created problems for cargo owners who did not have access to the necessary information. The principle in the Hague Rules that



the carrier is liable only when at fault was accepted as the general premise of the liability provisions for the Hamburg Rules.

13. Articles III (1) and IV (1) are only part of several crucial sections of the Hague Rules that deal with the balancing of risks between the carrier and the cargo owner. The formulation of the new provision in the Hamburg Rules to reflect a new balance of risks involved broader considerations than seaworthiness, such as care of the cargo and traditional exemptions from liability. The major emphasis appears to have been towards formulating a provision that would state a positive rule of responsibility based on fault and would avoid the negative approach of exceptions exemplified by the Hague Rules Article IV (2). Articles III (1) and IV (1) already reflected the goals of the Hamburg Rules' drafters, being both a positive rule and based on fault and the final version of Article 5 (1) includes the desired provisions concerning seaworthiness, without need, it was felt, to repeat them specifically in a separate section.

14. Hamburg Rules Article 5 (1) does, therefore, include the requirement that the carrier is to exercise due diligence to make the vessel seaworthy. This undertaking is covered by the term "reasonable measures". The requirement will apply at all times and will not be restricted to the beginning of the voyage. Concerning the burden of proof, the carrier will be liable for the damage he causes unless he

proves that he took all reasonable measures to avoid it. It would appear that the cargo owner need only show the existence of the damage, not that the vessel was unseaworthy and the damage was the result, before the onus is placed on the carrier.

15. One fear concerning the interpretation of Article 5 (1) is that the Courts will rely on old case law when seeking its meaning with the result that the carrier's responsibility may be weakened through the reintroduction of exceptions that the article was designed to exclude. It seems unlikely that this will cause a great problem as Article 5 (1) relates to seaworthiness. The terms "all reasonable measures" is as strict as "due diligence". One point of interpretation may significantly affect the carrier's responsibilities for the work of independent contractors. In Article 5 (1), the carrier need only show that "he, his servants or agents" took all reasonable measures. An early UNCTAD study indicated general support for the carrier's responsibility extending to independent contractors as expressed in the leading British cases. It has been previously noted, however, that the position of independent contractors in other provisions of the Hamburg Rules is uncertain. If old caselaw is used to distinguish servants and agents from independent contractors in Canadian courts, then the carrier will escape liability for their lack of due diligence when engaged to make his ship seaworthy. This conclusion was not intended by the drafters of

the Hamburg Rules. In other respects the Hamburg Rules will considerably improve the cargo owner's chances of recovery for loss or damage to his goods in a contested case.

## References

Para. 1. On the common law requirement for seaworthiness, see W.E.Astle, Shipping and the Law (London, Fairplay Publications, 1980), at pp.14-15; Payne and Ivamy's Carriage of Goods by Sea (11th ed.) (London, Butterworth's, 1979), at pp. 90-91; and Scrutton, (18th ed.), at pp. 421-422.

Para. 3. The leading case is Maxine Footwear v. Canadian Gov't Merchant Marine (1959), 21 D.L.R. (2d) 1; [1959] 2 Lloyd's Rep. 105; [1959] 2 All E.R. 740; [1959] A.C. 589; [1959] 3 W.L.R. 232 (Pr. Co.). In the Makedonia [1962] 1 Lloyd's Rep. 316; [1962] P. 190; [1962] 3 W.L.R. 343; [1962] 2 All E.R. 614 (Adm. Div.) it was determined that voyage meant contractual voyage. The case where the storm valve cover plates were stolen is Leesh River Tea Co. v. British India Steam Navigation Co. [1967] 2 Q.B. 250; [1966] 3 W.L.R. 642; [1966] 3 All E.R. 593; [1966] 2 Lloyd's Rep. 195 (C. of A.). The Hamburg Rules draftsmen recognized the problem in "Working Paper by the Secretariat Annex 1", Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 149.

Para. 4. The conflicting opinions are found in Tetley, at p.164 and Carver, (12th ed.), at paras. 264-265, and see also Astle, supra para. 1, at pp. 74-76, where the author suggests that the vessel can be made seaworthy at sea where the necessary action can be done at short notice.

Para. 5. It is in Maxine Footwear, supra para. 3, that the proposition concerning the overriding obligation in Article III (1) is found. Concerning the cargo owner's responsibilities as regards seaworthiness, see Scrutton, (18th ed.), at p. 433; Payne and Ivamy, supra para. 1, at p.87; and Astle, supra para. 1, at pp. 76-77. Tetley, at p. 155 states that the Hague Rules are unclear as to the cargo owner's responsibilities to show unseaworthiness and that the damage resulted therefrom and argues that the cargo owners who do not have the relevant facts available to them should not have to prove unseaworthiness. In Norman v. C.N.R. (1980), 27 Nfld. and P.E.I.R. 451, at pp. 502-503 (Nfld. S.C.T.D.) the Court noted Tetley's comments but determined that the cargo owner had to show unseaworthiness and probably had to make out a prima facie case.

Para. 6. General discussion of the meaning of due diligence can be found in Carver, (12th ed.), at para. 256; Scrutton, (18th ed.), at p. 423 and Tetley, at p. 165. Examples of due diligence are found in Tetley, at pp. 165-167 and Payne and Ivamy, supra para. 1, at p. 92-94 and see also Astle, supra para. 1, at pp. 16-17 on the history of due diligence. Concerning the personal obligation on the carrier, see Scrutton, (18th ed.), at p. 422; Astle, supra para. 1, at pp. 27-28 and 80-85; Carver, (12th ed.), at para. 257 and Tetley, at pp. 168-169. The leading British case is Riverstone Meat Co. v. Lanashire Shipping Co. [1961] A.C. 807; [1961] 2 W.L.R. 269; [1961] 1 All E.R. 495; [1961] 1 Lloyd's Rep. 57, (H. of L.) and see also W. Angliss Co. v. P. and O. Steam Navigation Co. [1927] 2 K.B. 456; 28 Lloyd's L.R. 202 (K.B. Div.). The personal liability referred to in the Riverstone Meat decision has been criticized in Carver; (12th ed.), at para. 259A and see the comments by Tetley, at p. 169. The second British case is Union of India v. N.V. Reederij Amsterdam [1963] 2 Lloyd's Rep. 233 (H. of L.). For a discussion of these two cases, see Astle, supra para. 1, at pp. 80-85.

Para. 7. The comments in this paragraph are from Astle, supra para. 1, at p. 18; Carver, (12th ed.), at paras. 260-261 and Scrutton, (18th ed.), at p. 422. Concerning the surveyor's certificate, see Payne and Ivamy, supra para. 1, at p. 94; Tetley, at p. 168 and Charles Goodfellow Lumber v. Verreault [1971] S.C.R. 522; 17 D.L.R. (3d) 56; [1971] 1 Lloyd's Rep. 185 (S.C.C.).

Para. 8. The quote is from Tetley, at p. 157. For other general definitions of seaworthiness, see Astle, supra para. 1, at p. 79; Carver, (12th ed.), at para. 108, and Scrutton, (18th ed.), at pp. 82-84. The list of items to be considered are from Astle, at p. 79. Tetley, at pp. 157-164 considers examples of seaworthiness. On electronic aids to navigation and a discussion of the American cases see, Astle, at pp. 88-90 and Tetley, at pp. 160-161. The Anglo-Canadian cases referred to are noted in Tetley, at pp. 160-161.

Para. 9. Concerning manning see Tetley, at p. 161; Scrutton, (18th ed.), at p. 423 and Astle, supra para. 1, at pp. 21-22 and 85-87. The British case is The Makedonia, supra para. 3. On supplying the vessel, note the discussion in Tetley, at pp. 164-165 and Astle, at pp. 22-23 and 90-92. Particularly on bunkers note The Makedonia decision.

Para. 10. On Article III (1) (c), see Astle, supra para. 1, at pp. 23-27 and 92-100.

Para. 11. The comments in this paragraph are from Tetley, at p. 155.

Para. 12. These two points are noted in several places in the UNCITRAL discussions, for example see, "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Doc. TD/B/C.4/ISL/19, 30 October 1975, at p. 19 and Report of the Working Group (Fifth Session), UNCITRAL Ybk., Vol. IV, 1973, at p. 139.

Para. 13. The major emphasis in the drafting of Article 5 (1) of the Hamburg Rules is noted in Report of the Working Group (Fourth Session), UNCITRAL Ybk., Vol. IV, 1973, at p. 141. The decision not to include the provisions of Articles III (1) and IV (1) is noted in Report of the Working Group (Fourth Session), at p. 142.

Para. 14. The comments in this paragraph are drawn from S. Mankabady, "Comments", at p. 54; Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Commercial L.Q. 1, at p. 7, and First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 304.

Para. 15. The fear is expressed in "Bills of Lading", supra para. 12 at p.24. The early UNCTAD study is "Bills of Lading", Report by the Secretariat of UNCTAD, U.N. Document TD/B/C.4/ISL/6/Rev.1, 1971, at pp.36-37. The position on independent contractors is discussed in Chapter II.A.4.



C. CARE OF CARGO

Hague Rules: Article II

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities and entitled the rights and immunities hereinafter set forth.

Hague Rules: Article III (2)

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Hamburg Rules: Article 5 (1)

The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Summary

The carrier has an obligation under the Hague Rules to look after the cargo carefully. An excepted peril will only excuse him from liability for cargo loss if he has exercised care. The carrier must claim the exemption, but whether he or the cargo owner has to prove compliance with, or breach of, the duty of care is still uncertain. Fortunately, independent evidence, such as the report of a port warden under the Canada Shipping Act, is usually available.

The standard of care is to act both "properly and carefully". Properly connotes sound and efficient methods.

Thus, the carrier's duty is to provide a sound system of carriage that is operated with efficiency and care. This duty falls on him even if he hires others to fulfill it for him.

The carrier's responsibilities are to load, handle, stow, carry, keep, care for and discharge the cargo. Contrary to the apparent intent of the Rules, the carrier is permitted to contract with cargo owners about their involvement in loading, stowing and discharging, thus excusing himself in large part from these operations. However the carrier cannot avoid his responsibility for what one cargo owner may do to the extent that his acts affect the goods of others on board. The carrier's obligation to carry the goods he accepts is for the whole contracted voyage, unless an emergency intervenes. Although he is not bound to accept a cargo offered for carriage, if he does so, he assumes the burden of knowing or learning how to handle it properly.

The Hamburg Rules adopt the principles of the Hague Rules in the sweeping language that the carrier must take all reasonable measures to avoid damage to the cargo. They will strengthen the position of cargo owners in two respects. They clearly place the onus of proof of compliance with the duty of care on the carrier, and they omit the list of excepted perils, although there is a risk the courts may see fit to reintroduce similar excuses in the process of interpretation.

#### Legal Commentary

1. In every contract of carriage the Hague Rules

Article II make the carrier bear responsibility for "loading, handling, storage, carriage, custody, care, and discharge" of the goods. His precise duties are set out in Article III (2). However, the carrier's obligations to care for the cargo stated in Article III(2) are expressly subjected to the exceptions from liability in Article IV (2). As a result, difficulties have occurred about both the duty owed and the proof of its breach. As to the duty of care, it is now clear that the availability of an exception under Article IV (2) does not relieve the carrier from responsibility where he has breached his obligations under Article III (2). Moreover, it is now clear that the exceptions in Article IV (2) in no way lessen the degree of skill expected of the carrier, or in any way excuse him from performing his Article III (2) tasks properly and carefully. Concerning the burden of proof, the question is still whether the carrier must show compliance with Article III (2) as well as claiming his exception from liability, or whether, once an exception is asserted, the cargo owner has to show breach of the Article. The latter approach has been the practice at common law and is recommended by many commentators. The former position has arisen in several cases, although, arguably, the question has never been directly settled. Fortunately, the burden of proof problem does not arise in many cases since it is general practice for all parties to provide as much information about the event in question as possible. Indeed, independent reports of surveyors and of port wardens, in addition to the noted protests of masters, are frequently

available.

2. The carrier is required "properly and carefully" to fulfill the obligations of Article III (2). "Carefully" does not have an absolute meaning, but relates to the reasonable degree of care that a reasonably competent person skilled in the trade, given the relevant information, ought to display. In a leading British case the term "properly" was said to have a slightly different meaning than "carefully". "Properly" was held to mean that the cargo must be loaded, handled, stowed, carried, kept, cared for, and discharged in accordance with a system which, under all the circumstances in relation to the general practice of carriers of goods by sea, and in light of all the knowledge which the particular carrier has, or ought to have, about the nature of the goods, is sound. "Properly" was determined to equate very closely with efficiency. The result is that the carrier must look after the cargo according to a sound system and that system must be operated with care.

3. Similar to the carrier's obligations under Article III (1), the obligations under Article III (2) are personal to the carrier. He is responsible for the performance of the obligations even when they are undertaken by servants, agents, or independent contractors for him.

4. Although Article III (2) indicates that the carrier is properly and carefully to load and discharge the cargo, this has been interpreted as permitting him to contract with the cargo owner about these operations. Such contractual

arrangements have been held to define the scope of the contract rather than the terms upon which the service is to be performed. The result of this interpretation is that the carrier can contract out of his obligation to load or discharge. Where the carrier is involved in loading or discharging, the operation must be performed properly and carefully, and even when the shipper does load the cargo, the carrier is responsible for damage to the goods of third parties.

5. The carrier has a duty under Article III (2) properly and carefully to stow the cargo, which he cannot completely avoid even where the shipper loads his own goods. The carrier will always be responsible for the safety of the vessel and the other cargo being carried. Proper stowage means such stowage that goods of one kind do not affect goods of another kind, that refrigeration is provided where required, that proper ventilation is provided where necessary, and that the cargo is well-packed. By Section 609 of the Canada Shipping Act the port warden will, if requested, open the hatches of a vessel to inspect the cargo and provide an independent report of its condition. If someone else, like the carrier, first opens the hatches and damaged goods are discovered, section 611 treats the finding as prima facie evidence that the injuries were the consequence of bad stowage or carrier negligence.

6. The obligation to "carry" in Article III (2) refers



only to the contractual voyage. If the carrier off-loads the cargo prior to completion of the contractual voyage at a place that is not an agreed port of discharge and there is no emergency requiring the action, he will breach his duty to carry it properly. The duty to care for and keep the cargo is wholly upon the carrier since the duty exists during the voyage, although the obligations may well apply at other times. It is well to recall that Article III (2) defines the terms on which the contract is to be performed and not the scope of the contract. The carrier is not obliged to accept a cargo for carriage, but, if he does, he must take reasonable measures to acquire the necessary information so that the goods may be carefully and properly kept and cared for. A lack of reasonable knowledge of the proper requirements for safe passage of the cargo amounts to a failure to care for it.

7. The obligation in the Hague Rules to act properly and carefully implies a standard of liability based on fault. This is also the general premise of Article 5 (1) of the Hamburg Rules. The requirement upon the carrier to take all reasonable measures to avoid damage to the cargo is to be treated as incorporating the obligation in the Hague Rules Article III (2). The confusion over excuse of the duty and proof of its breach are resolved by the Hamburg Rules. The list of exceptions has been omitted while the carrier will clearly bear the burden of proof that he undertook all reasonable measures to prevent cargo damage. Thus the Hamburg

Rules incidentally adopt the sensible approach of placing the onus of proof on the party who has ready, if not exclusive, access to the necessary evidence. The real test of Article 5 (1) will be the way the courts handle the old cases on excepted perils.

### References

Para. 1. In Gamlen Chemical Co. v. Shipping Corporation of India Ltd. [1978] 2 N.S.W.L.R. 12 (C. of A.) the Court was faced with the plea that Article IV (2)(c), if shown, would relieve the carrier of responsibility even where the carrier had admitted to a breach of obligation under Article III (2). The Court rejected this, holding that after the carrier had shown that an exception under Article IV (2) was applicable, it was open to the cargo owner to show a breach of Article III (2) obligations (negligence). On the relationship between Articles III (2) and IV (2), see F.J.J. Cadwallader, "Care of Cargo under the Hague Rules" (1967), 20 Current Legal Problems 13, at pp.28-30 and note the recent Canadian case Atlantic Consolidated Foods Ltd v. The Ship Doroty [1979] 1 F.C. 283 (Fed.Ct.T.D.), aff'd. (1981) 35 N.R. 160 (Fed.Ct.A.D.). The trial court, at p.295, confirmed that Article IV (2) does not lessen the carrier's responsibility under Article III (2). Carver, (12th ed.), at para. 266 discusses the common law position concerning the proof burden and the case law provision and argues that the common law position is preferable. Scrutton, (18th ed.), at p. 437 generally agrees that the common law approach is better. The Court in the Gamlen Chemical case accepted the common law approach, as does Tetley, at pp. 262-262. Cadwallader at pp. 32-40 does not accept that the common law position is the correct one. In The Ship Doroty, the Federal Court Trial Division held that the carrier had "to show that he has properly and carefully performed all his tasks but that the damage to the cargo is excused under one of the exceptions".

Para. 2. On the meaning of "carefully", see Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p. 29. The leading British case is Albacore S.R.L. v. Westcott and Laurance Line [1966] 2 Lloyd's Rep. 53 (H. of L.), and see, Renton and Co. v. Palmyra Trading Corp. [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957; [1956] 2 Lloyd's Rep. 379. (H. of L.). Comments on these cases are in Cadwallader, supra para. 1, at pp. 16-18; Carver, (12th ed.), at para. 267A; and Scrutton, (18th ed.), at p. 424.

Para. 3. The comments in this paragraph are from Scrutton, (18th ed.), at pp. 424-425; Carver, (12th ed.), at para. 269 and Astle, supra para. 2, at p. 29.

Para 4. Concerning the interpretation of Article III (2) as it relates to loading and discharging, see Carver, (12th ed.), at para. 268; Cadwallader, supra para. 1, at pp. 18-19; Scrutton, (18th ed.), at p. 424 and Pyrenne Co. v. Scindia Navigation Co. [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158; [1954] 1 Lloyd's Rep. 321 (Q.B. Div.) and also the discussion of loading and discharging under Period of Responsibility, supra Chapter II.C.4. The comment on carrier responsibility to third parties is from Tetley, at pp. 258-259.

Para. 5. Concerning stowage by the shipper, see Tetley, at p. 264 and Cadwallader, supra para. 1, at pp. 19-20. Proper stowage is discussed in Astle, supra para. 2, at p.31 and see the cases noted by Tetley, at pp. 267-269. On Section 611, see Tetley, at p.264.

Para. 6. For comments on the duty to carry see Scrutton, (18th ed.), at p. 424 and Astle, supra para. 2, at p.33. Concerning keeping and caring for the cargo, see Cadwallader, supra para. 1, at pp. 21-25 and Tetley, at pp.273-275.

Para. 7. For comments on Article III (2) and the Hamburg Rules, see S. Mankabady, "Comments", at p. 54; "Working Paper of the Secretariat, Annex 1", Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 149, and Robert Hellawell, "Allocation of Risk Between Cargo Owner and Carrier" (1978), 27 Am. J. of Comp. L. 357, at pp. 358-359. For more elaborate comments on the impact of Article 5 (1), see Seaworthiness of Ship, Section B, at para. 15 and note the concern expressed in "Bills of Lading - Comments on Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Doc. TD/B/C.4/ISL/19, 30 October 1975, at p. 24.

D. EXCLUSION OF LIABILITY

Hague Rules: Article IV (2)

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
- a. act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
  - b. fire, unless caused by the actual fault or privity of the carrier;
  - c. perils, danger, and accidents of the sea or other navigable waters;
  - d. act of God;
  - e. act of war;
  - f. act of public enemies;
  - g. arrest or restraint of princes, rulers or people, or seizure under legal process;
  - h. quarantine restrictions;
  - i. act or omission of the shipper or owner of the goods, his agent or representative;
  - j. strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
  - k. riots and civil commotions;
  - l. saving or attempting to save life or property at sea;
  - m. wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
  - n. insufficiency of packing;
  - o. insufficiency or inadequacy of marks;
  - p. latent defects not discoverable by due diligence;
  - q. any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Hamburg Rules: Article 5 (1), (4), (7)

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could

reasonably be required to avoid the occurrence and its consequences.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage, or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

### Summary

The excepted perils listed in the Hague Rules are critical to the distribution of the risks of loss between the cargo owner and the carrier. Loss is not limited to physical damage to cargo but may include the consequences of delay and misdelivery. Each of the seventeen grounds (a-q) of exclusion of liability for the carrier are considered in turn.

(a) The carrier is not responsible for losses caused by the negligence of his employees, such as the master or crew, in



the navigation or management of the ship. The historical rationale, that the ship was out of contact and control of the carrier during the voyage, has been undermined by developments in communications. Consequently the exception is very controversial. The courts have discretionary control in determining whether an error goes towards the ship or the cargo. This difficult distinction is being less amply made in favour of carriers.

(b) Fire is a ground of exemption from liability for the carrier provided it did not occur through a personal fault of his own. If the carrier is incorporated, the company is attributed with culpable acts of its principal managers. The exemption will cover all damage caused by fire, but it will not operate if the fire itself was caused by a lack of due diligence to make the ship seaworthy.

(c), (d) Perils of the sea and acts of God are exceptions because they are unexpected hazards. The cargo owner takes the risk of loss caused by an event of the sea which the carrier cannot be expected to guard against as a probable incident of the voyage.

(e), (f), (g), (h), (k) (1) A number of other unexpected perils not of the sea are also exceptions. They include acts of war and of public enemies and riots, arrest, seizure and quarantine of the ship, and attempts to save life or property at sea. If these incidents are shown by the cargo owner to have been suffered as the result of the carrier's negligence, then the exceptions do not avail him.

(j) The carrier is not responsible for the consequences of labour disputes and work stoppages, unless they were his own fault. To be exempt, he must prove that he acted reasonably under the circumstances of the labour problem in the interests of the cargo as well as himself. He will continue to bear a duty of care for the goods until they are discharged, which must be done according to the strike clause usually included in the bill of lading.

(i), (m), (n), (o) Four exceptions relate to the cargo or its owner. The carrier is excused from liability for losses caused through the inherent character, a hidden defect, insufficient packing, or inadequate marking of the goods, or by the acts or omissions of the cargo owner. The last phrase is, in practice, substantially covered by the earlier incidents, but if the cargo owner commits other faults, the carrier will not be liable if he can prove they are the cause of the loss.

(n) The packing of goods needs only be good enough to withstand normal handling to be expected in the course of carriage. The customary packing of the trade is usually sufficient. Insufficiency of packing that is apparent at loading should be noted on the bill of lading. If the carrier issues a clean bill, he cannot afterwards assert the exemption. A claused bill will protect his claim to the exception, provided he fulfils his duty of care of the goods.

(o) To found an exemption on the cargo's marks, they must have been so poor as to make the goods unidentifiable and so caused their loss. As with packing, the carrier should note

the inadequacy of the marks on the bill of lading and, if he does not, he cannot later exclude his liability towards the consignee. However, the shipper guarantees the marks so the carrier will never be responsible to him and may even claim an indemnity for liability to others.

(m) Hidden defects and inherent vices, such as wastage, of the goods are exceptions just because they are latent characteristics. Nevertheless the carrier must still take care of the cargo, which includes acting prudently in light of the typical inherent characteristics of a particular cargo about which he may be expected to know.

(p) Latent defects in the ship also exclude liability for the carrier provided he has diligently sought to eradicate them. Since the carrier must also exercise diligence to make his ship seaworthy before the voyage, the exception has little impact at that time.

(q) Finally, the carrier is exempt from liability for damage from any other cause that was not the fault of himself, his employees and his subcontractors. The exception has no generic reference. Indeed, it has been asserted to include all the previous exceptions when the loss is not attributable to the carrier's fault. To succeed, the carrier must prove he was not at fault and probably also how the loss was caused, for it is frequently impossible to judge his conduct unless the cause of the damage is known.

The Hague Rules no longer provide an acceptable balance in the risks of sea carriage in the eyes of some participants.

The Hamburg Rules seek a new balance of interests, a coherent scheme of proof, and a reasonable standard of cargo care. To these ends, the Hamburg Rules will abolish all the exceptions save one, and will establish a general principle of liability based on fault. The carrier will be liable for all losses while the cargo is in his charge unless he can show that he took all reasonable measures to avoid them. Thus the carrier will be encouraged to take reasonable care of the goods and will almost always have to prove that he did so in order to escape liability. The exception is loss occasioned by fire. In this event, the carrier will only be liable when proven to have been neglectful in preventing or stopping the fire by the cargo owner.

The measure of care that is reasonable is legally uncertain. How this principle will compare to current standards of the Hague Rules for the different facets of carriage will only be determined by the courts, who, some fear, may do so by reintroducing past exceptions. Judging by the comparative experience of other transport conventions, the Hamburg Rules will provide a new balance in the risks of sea carriage that will not upset insurance markets and shipping costs.

### Legal Commentary

1. Article IV (2) of the Hague Rules has long been the centre of attention for carriage lawyers, since it is from here that the carrier attempts to find an excepted peril that fits

the facts of the case and thus exempts him from liability for loss or damage to the cargo owner. It is the key provision in the distribution of risks between the cargo owner and the carrier. Prior to a discussion of the general problems of the statutory exceptions, each will be reviewed in turn.

2. Article IV (2) (a) is one of the most controversial exclusions since it allows the carrier to avoid liability for cargo loss caused through the negligence of his employees. Historically this clause was included for the protection of the carrier because there was no contact between him and the master of his ship during the voyage. The master had to act on his own independent judgement, which, it was thought, should not be attributed to the shipowner. Similarly, the cause of liability ought not to be imputed to the carrier, it was said, because of the delicacy of the decisions to be made. Modern methods of communication have substantially destroyed this rationale. The negligence which the carrier wishes to disclaim may not be personal to himself, but must have been committed by the master, mariner, pilot or servants of the carrier in relation to the navigation and management of the vessel. Where it is the carrier that is negligent then Article IV (2) (a) will not provide a defence. Each case must be decided on the basis of its own facts, but generally to fall under Article IV (2) (a) the error in navigation or management must primarily affect the ship. The original purpose of the act or omission must have been directed towards the ship, her safety and well being, or towards the venture generally. An error directed principally



to the cargo will be considered as falling outside the exemption from liability provided by Article IV (2) (a). It is clear that courts could interpret this provision very broadly, and therefore, cover almost everything that could happen on board as within the navigation and the management of the ship. The normal rule of proof by the claimant applies, so under Article IV (2) (a) the carrier must show that the loss was the result of negligence in the navigation and management of the vessel. The cargo owner is left with trying to show that the negligence was personal to the carrier or that some other cause of the loss operated concurrently. In the event of concurrent causes for which the carrier is exempt from liability from one, but not the other, the onus appears to be on the carrier to show the extent of damage attributable to the excluded cause at the risk of being held liable for the total loss.

3. Article IV (2) (b) excludes the carrier from responsibility for damage to goods caused by fire unless the fire is caused by his own actual fault and privity. The loss must be related to a flame and not just heat, although once there is a flame the damage to cargo from heat and reasonable efforts to extinguish the fire would be included. In combination with Article IV (2) (a), the carrier is relieved of liability in cases where negligent acts of servants or agents cause the fire, provided their acts are not attributable to the corporate carrier as its actual fault. The carrier cannot escape liability for a fire that was his own fault. The phrase "actual fault or privity" connotes something personally

blameworthy in the carrier. In the case of corporate carriers, the acts of the employee who is the controlling mind of the business are imputed to the company. If the fire is caused by the lack of due diligence to make a vessel seaworthy, then the carrier may not rely on Article IV (2) (b). The carrier must prove that the fire caused the damage, but the burden of showing actual fault or privity is unclear. In one Canadian case reliance was placed on English authority, which applied an English statute, the equivalent of which does not exist in Canada. The onus was held to be on the carrier to disprove the existence of actual fault or privity. A more recent Canadian case comes to the same conclusion.

4. The most common plea by the carrier is that the loss was caused by "perils of the sea" and, therefore, he is not liable by virtue of Article IV (2) (c). Canadian jurisprudence has tended towards a low criteria for determining when an event qualifies as a peril of the sea. Generally, a peril of the sea is an event that would not be expected on the particular sea route, at that time of year and could not have been foreseen or guarded against as a probable incident of the voyage. The existence of a peril of the sea is a question of fact in every case. It is for the carrier to prove both the existence of the peril and that the loss or damage was the result of it. It is unclear whether the carrier must show that reasonable action was taken to protect against the peril as well as demonstrate that no negligence was involved. It has been suggested that the plea of perils of the sea presupposes the absence of

negligence. Article IV (2) (d), "act of God", is almost identical to the "perils of the sea" exception and so these two are often grouped together.

5. Several other exceptions in Article IV (2) are similar to "perils of the sea" and "act of God" in that they are unforeseen interruptions in the voyage: (e) act of war; (f) act of public enemies; (g) arrest or restraint of princes, rulers or people, or seizure under legal process; (h) quarantine restrictions; (k) riots and civil commotions; and (l) saving or attempting to save life or property at sea. It is upon the carrier to prove the existence of the events that make the exception applicable and that the damage was a consequence of the exception. Unlike under Articles IV (2) (c) and (d) there does not appear to be a requirement that the carrier show reasonable care in avoiding the facts leading to the exemption. In Common Law, after the carrier has shown that an exception is applicable, the burden is on the shipper to show that the carrier was negligent. Where the carrier's negligence either caused the exempting act or concurred with it in producing the loss or damage, it is presumed that the exception will not be applicable and the carrier will be liable. Otherwise the carrier would avoid responsibility for his own negligence.

6. Article IV (2) (j) grants the carrier immunity where partial or general restraints of labour cause the damage. It is a question of fact whether a particular work stoppage or slow down fits within the terms of this exception and it is

upon the carrier to show that they do. The leading Canadian case indicates that the carrier must prove that no negligence on his part contributed to the loss and that the action taken by him was reasonable for his own and the cargo owners' interests. It appears that this dual requirement is the reverse of the burden examined in paragraph 5. In the event of a strike the carrier must continue to take reasonable care of the goods, but liability will not attach unless the carrier is personally at fault for the stoppage or negligent in regard to the goods. The responsibility upon the carrier in the event of a strike bound port depends upon the terms of the bill of lading. Usually strike clauses are included so as to provide alternative or convenient ports for discharge in the event of work stoppages. The action taken must be reasonable for the carrier and the cargo owner. The cargo owner assumes responsibility for the goods when they are discharged in port even though it is different from the one contracted.

7. Four of the Article IV (2) exceptions relate to the cargo or its owners. The carrier will be exempted from responsibility where the damage results from: (i) an act or omission of the cargo owner; (m) an inherent defect, quality or vice of the goods; (n) insufficient packing; or (o) insufficient or inadequate marks. Insufficient packing means insufficiently packed to withstand the handling that such goods will be likely to undergo in the course of the carriage. The normal and customary packing of the trade is generally considered to be sufficient. For instance, in the case of

automobiles no packing is the customary way the goods are shipped, so the carrier cannot assert insufficiency. The exception will not protect the carrier where the packing did not prevent theft. If a clean bill of lading of goods is being relied upon by a consignee but the insufficiency of their packing was reasonably apparent at loading, the carrier is estopped from claiming the exemption. Where it is not reasonably apparent at loading that the packing is insufficient, the carrier may try to show it. The carrier can always raise the plea of insufficiency of packing for cargo within a container since its condition would not be apparent at the time of loading. Any insufficiency of packing that is apparent at loading should be noted clearly on the bill of lading. However, a claused bill cannot, by virtue of Article 3 (8), alleviate the carrier of responsibilities including the care of the cargo, but it does allow him to exculpate himself if he can show that the damage resulted from the insufficient packing. This exemption only operates against the owner of the goods that are insufficiently packed. The carrier is not excused liability on this ground for damage caused through the poor packing of one cargo to other cargo.

8. For the carrier to be able to take advantage of Article IV (2) (o) the insufficiency or inadequacy of marks must be so great as to make the goods unidentifiable, thus causing them to be lost, misdelivered, or mixed with other cargo. The exception is narrowly framed and does not appear to cover situations where the marks are incorrect or inadequate,



if that is not the cause of the loss. Under Article III (5), the shipper guarantees the marks and so, when losses occur, the carrier may seek an indemnity from him. By Article IV (5), where the carrier can show that the shipper has knowingly misstated the nature of the goods by the marks used, he is relieved completely of liability. To take advantage of Article IV (2) (o) it is for the carrier to prove his claim to the exemption, but he may be estopped if he has issued a clean bill of lading. Estoppel would operate against the carrier if pleaded by a consignee, but, because of the guarantees implied by Article III (5), it would not be applied in favour of the shipper.

9. Article IV (2) (m) allows the carrier to exclude liability where the damage is caused by a hidden defect or inherent vice of the cargo. An inherent vice is a characteristic which is normal or natural in the goods. A hidden defect is something in the cargo that is not normally to be expected. The determination of an hidden defect or vice is a question of fact which often depends on the kind of transit required by the contract of carriage. In an important Canadian case the damage to a cargo of apples was the result of an inherent vice or defect since the carrier did not know they were over mature when loaded and the knowledge could not be imputed to him. Since the carrier is required to take reasonable care of the cargo during the voyage, his knowledge about particular goods is critical. It seems clear that where the cargo has well known characteristics, the carrier is deemed

to know these and will be expected to act so as to reduce damage from potential hidden defects and inherent vices. The carrier must prove the existence of the inherent vice or hidden defect in the goods and in many cases will also have to show that he acted prudently towards them. The burden of proof of this exception is uncertain. A clean bill of lading will not create an estoppel against the carrier because it only represents the apparent condition, and not the hidden defects or the inherent vices, of the cargo.

10. Article IV (2) (i) has been described as a residuary provision after exhausting the possibilities of Articles IV (2) (m) (n) and (o), since they are likely to cover most of the acts or omissions of a shipper, or his servants or agents, that cause damage to cargo. It is apparent that the carrier should not be liable where the shipper is at fault. The burden is on the carrier to show that the damage was caused by fault attributable to the shipper.

11. Article IV (2) (p) exempts the carrier from liability where the cause of the cargo damage is a latent defect not discoverable by due diligence. A defect is said to be latent when it cannot be discovered by a person of competent skill using ordinary care. The reference to due diligence accordingly seems repetitious and redundant. It is generally considered that the defect must be in the vessel and not the cargo, although it has been suggested that this provision may include latent defects in other cargo or in shore tackle. To take advantage of this provision the carrier must show that due

diligence was exercised in ship inspections and surveys. Unlike the issue of seaworthiness, due diligence must be exercised at all inspections of the vessel whenever they are made, and not just before and at the beginning of the voyage. The carrier must prove his behaviour was diligent. As with seaworthiness, the obligation is personal so that he remains responsible for the quality of work which he contracts out to be done on his ship by others. In an important British case, seawater broke through an undetected defect in the vessel's hull. The court held that the defect was undiscoverable by due diligence and, therefore, the carrier had both shown he had fulfilled his obligation to make his vessel seaworthy and proved his exemption from liability on account of a latent defect. It thus appears that the necessity of proving due diligence for seaworthiness will frequently usurp the utility of the exception for latent defects, at least before the voyage has begun.

12. The final paragraph (q) of Article IV (2) is a general provision that allows the carrier to exclude liability in the absence of negligence or fault on the part of himself and of his servants or agents, for damage from any cause other than those listed in (a) to (p). It has been argued that Article IV (2) (q) has the effect of excluding carrier liability in all cases, regardless of whether the case fits within paragraphs (a) to (p), when the loss is not attributable to carrier fault. Further, it is said that (q) effects the proof burden to the extent that, in all situations where the

carrier seeks to rely on an exclusionary provision, the carrier must show lack of negligence. A broad interpretation of "other causes" is appropriate since the catalogue of exceptions in (a) to (p) has no genus. Theft is one cause of loss that is usually asserted under Article IV (2) (q). The onus on the carrier to prove that he was not at fault may not be fulfilled if he does not also show the cause of the loss. Where the loss is inexplicable, it is disputed whether it is sufficient for the carrier merely to show an absence of negligence. The better view is that it is not sufficient. Any other approach would allow the carrier to fail to produce appropriate evidence in his possession which would show the cause of loss. Yet it is quite often impossible to determine whether fault exists unless the cause of the damage is identified. Servants or agents for whom the carrier must show lack of fault in paragraph (q) include independent contractors, such as stevedores, and other persons employed by the carrier to care for and handle the goods during the period covered by the Hague Rules.

13. The personal position of servants, agents and independent contractors under the Hague Rules has already been discussed. The Hague/Visby Rules, by adding Article IV bis 2, will assure to servants and agents, but not independent contractors, the same rights of exemption from liability as carriers.

14. The opening line of Article IV (2) states that the carrier shall not be liable for loss or damage arising from any

of the exemptions listed. Loss or damage was considered in a leading British case to mean more than just physical loss or damage. The phrase includes losses caused by delay and misdelivery. The Court noted that the only limitation is that the loss must be in relation to risks explicitly stated in Article II.

15. Two major complaints about Article III and IV as they seek to distribute the responsibilities between the carrier and the shipper are: i) grave uncertainty and inconsistency about burdens of proof, and ii) liability is stated negatively, with the result that the seventeen exceptions are very prominent. In the drafting of the Hamburg Rules these problems were debated while states were seeking to agree on a new balance of carriage risks.

16. The drafters of the Hamburg Rules decided upon liability based on fault, rather than a strict liability approach. They modeled Article 5 (1) on the responsibility provisions contained in the other international transport conventions. The wording will make the carrier liable for cargo loss, unless he can show lack of negligence. Thus the Hamburg Rules will impose a principle of no liability without fault, with the rider that in cases where the facts are uncertain the burden will rest on the carrier to show prudence and diligence on behalf of himself and his servants and agents. This conclusion is confirmed by the Common Understanding Adopted by the United Nations Conference on the Carriage of



Goods by Sea and annexed to the Convention:

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

Once the decision was made to base liability on fault and to examine liability as a total package, it was decided to drop the listing of exceptions and adopt the criterion of reasonable care. However, two exceptions under the Hague Rules Article IV (2) were considered separately and these were (a) on navigation and management of the ship and (b) as to fire.

17. Two considerations were of prime importance when the drafters of the Hamburg Rules sought to unravel the tangled web concerning the burden of proof. First, the burden should be placed on the party most likely to be able to produce the evidence and know the facts. Secondly, should the onus not be satisfied, the loss will accrue in a manner consistent with the policy objectives concerning fault. In light of both points it was considered desirable to place the burden of proof on the carrier. Any consideration of putting the onus on the shipper would leave open the possibility that the carrier could be excused for negligence. It has already been noted that under the Hague Rules, where there are concurrent causes of damage,

the carrier must show the extent of damage attributable to the cause for which he is not responsible on pain of liability for the entire loss. Article 5 (7) of the Hamburg Rules echoes this approach and will allow the carrier to introduce concurrent causes such as shipper negligence and act of God. Article 5 (7) rounds out the principle expressed in Article 5 (1) that the burden of proof shall be borne by the carrier.

18. As marine technology has improved, the Hague Rules have been viewed by cargo owners as increasingly in the interests of carriers. It was this shift in the balance of risks that the drafters of the Hamburg Rules sought to reform. Their goal was an acceptable balance of interests, a coherent burden of proof scheme, and a reasonable standard of care for the cargo. A system where liability was based on fault, it was felt, would promote a reasonable standard of care, since it would be in the interests of the carrier to act diligently. Fault, however, is a question of fact and often may encourage a carrier who is sloppy. Fault is not a constant but changes as circumstances alter, often according to industry practice. Regrettably, the industry may not employ the most up-to-date technologies that would be consistent with an optimum standard of care.

19. The simplification of the burden of proof rules and the elimination of the catalogue of exceptions through the adoption of Article 5 (1) should lead to a clearer and simpler system and a consequent dropping of negotiation, arbitration, litigation, investigation and other such matters which are

referred to as "friction". Friction is wasteful and a drain of resources. The improvements in clarity mentioned above should help reduce the friction, evoked by a sense of unfair rules, but liability based on fault is a factual question that will also invite litigation in hard felt cases. However, to the extent the Hamburg Rules will shift responsibilities for damage to the party who might avoid it, namely the carrier, these may also be a reduction in the occasions of fault and neglect.

20. It was over the inclusion or deletion of Hague Rule's Article IV (2) (a) and (b), concerning navigation and management of the ship, and fire respectively, that the conflicting interests of the shippers and the shipowners were most obvious during the drafting of the Hamburg Rules. Both exceptions allow the carrier to escape liability where his servants and agents are negligent. Since the carrier is in a position to control his servants or agents, he is best able to ensure they live up to the optimum standard of care. The ocean carriers conceded that management of the ship should be determined on the basis of liability for fault, but in relation to navigation they argued about the high risks involved in sea carriage.

21. The United Kingdom urged that the exception for navigation should continue to exist. The United Kingdom noted that its omission would "destroy the ancient institutions of salvage and general average" because the carriers would no longer be able to give the salvor guarantees respecting the cargo, and the key concept underlying general average, the

joint venture, would no longer exist. It was also argued that the control of navigational duties is beyond the shipowners by the nature of the operation and because carriers have little free choice in employing ship-board servants. Further, it was suggested that in cases of collision or navigational incidents protracted litigation would result from including navigational errors in the general sweep of liability based upon fault.

22. The arguments in favour of retention of the fire exception were that fires aboard ship are often caused by the cargo, and that determining the cause of fire is quite difficult.

23. The chief concern of the drafters, and a major unknown effect, of the Hamburg Rules involves insurance and economic costs. The Hague Rules were perceived to be inefficient in that they encourage overlapping insurance by the carrier and the cargo owner because of the ambiguities and uncertainties in the fault provisions. The way to reduce double insurance is to impose liability either completely on the carrier or on the shipper. Since such a strict liability approach was not adopted, overlapping insurance will continue to exist. Indeed, it is in the cargo owner's best interest to have insurance because of unit limitation, general average liabilities, overall limitations of liability that exist by statute and international convention, and the possibility of an uninsured bankrupt carrier. Greater fears attended the unknown impact on costs that increased carrier liability would create. Those seeking retention of the navigational and fire exceptions

argued that greater carrier liability would increase the cost of Protection and Indemnity Insurance (P. and I. Insurance), which in turn would lead to increased freight rates being levied on shippers. These increased freight rates would, it was argued, be greater than any saving the cargo owner may experience in lower cargo insurance, with the result that the costs for the shipper would increase. It has yet to be determined whether the Hamburg Rules will lead to greater shipping costs. It is not a simple question of passing on economic costs since the insurance industry is quite competitive and may be willing to absorb any changes. Moreover, marine insurance is based on experience, which may not dictate increased rates. Even if liability insurance rates were to increase, the carrier's particular competitive position will further influence whether those increases are passed on to the cargo owner through increased freight rates. At least one conclusion made respecting total insurance and transport costs is that "it is highly doubtful" whether the Hamburg Rules would make any difference, but if a difference in total costs occurred it would be very modest.

24. It has been suggested that the drafters of the Hamburg Rules failed adequately to examine the question of insurance, in particular, the potential shifting of market shares from cargo insurers who are mostly domestic, to P. and I. Clubs, which are generally located in London and Scandinavia. Since cargo damage is almost always covered by insurance, the liability provisions essentially determine which



insurer will bear the loss. It has been suggested that, as a result of the liability provisions in the Hamburg Rules, especially the deletion of the carrier's exculpation for negligent navigation, the market share between the cargo insurers and P. and I. Clubs will alter in favour of the latter.

25. Article 5 (4) represents the compromise of these differences reached by the Hamburg Convention. The navigation exception was excluded but the burden of proof was reversed in cases of fire. This compromise was part of a larger package deal that included the limitation amount and the ability to avoid that limitation amount in cases of wilful misconduct. Under Article 5 (4) the burden will be on the shipper to prove that the fire was caused by the fault or neglect of the carrier, his servants or agents. It appears that if a fire should occur without fault, the carrier would not be liable unless he should fail to take all measures that could reasonably be required to put out the fire. In an improvement on the Hague Rules Article IV (2) (b), the fault is extended beyond the carrier to include the neglect of his servants and agents. Moreover, by Article 5 (4) (b), there is provision for a marine survey to be made to investigate the causes and circumstances of the fire. This provision is designed to reduce the burden of proof on a shipper under circumstances that would be particularly difficult to show the carrier was negligent in preventing or dousing the fire. Although it is recognized by the commentators that Article 5 (4) is a

compromise provision, it has been severely criticized as being archaic and in contradiction to the basic principles and policy of Article 5 (1).

26. Article 5 (1) requires the carrier to take reasonable care of the cargo. The level of care envisioned is open to question, since the new language has not previously been used in carriage parlance. The adoption of this language and the general construction of Article 5 (1) brings carriage of goods by sea into line with the other transport conventions and will surely facilitate multimodal transportation. It is, however, unclear whether the requirement of reasonable care equates with the standards of due diligence and the proper and careful navigation and management of the vessel and handling of the cargo. It will take case law to determine the exact extent of the obligation on the carrier.

27. One of the fears expressed by the UNCTAD Secretariat is that Article 5 (1) will be interpreted through the use of the old cases with the possible result that many of the deleted exceptions may reappear. There is some merit in this concern since one commentator has been quick to suggest that all the exceptions from (c) to (q) of Article IV (2) of the Hague Rules have been retained in Article 5 (1) of the Hamburg Rules, leading one to believe that the old cases are still applicable. Similarly, it has been previously noted that "due diligence" for seaworthiness is supposed to be incorporated by "reasonable measures" in Article 5 (1), thus allowing old cases to be reasserted. One author suggests that,

although past jurisprudence would help to explain the level of reasonable measures, the new wording must be interpreted from a clean slate.

28. Article 5 is untried and untested, but judging by the experience of the other transport conventions it will yield adequate results that will not be upsetting to insurance markets, shipping costs, or carriage in general.

### References

Para 2. The historical reason for Article IV (2) (a) is found in First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 288. Comments on the personal nature of Article IV (2) (a) are from Carver, (12th ed.), at para. 282 and Tetley, at p. 175. The general nature of Article IV (2) (a) is described in Tetley, at pp. 171-172 and cited in "Bills of Lading", Report by the Secretariat of UNCTAD, U.N. Document TD/B/C.4/ISL/6/Rev.1, 1971, at p. 38. The leading case on distinction between Articles IV (2) (a) and III (2) is Gosse Millerd v. Cdn. Gov't Merchant Marine [1929] A.C. 223; 31 Lloyds L.R. 91 (H. of L.) where Article IV (2) (a) was held to be applicable only where the act or omission involved was designed to affect the entire vessel and not just the cargo. This approach was recently followed in The Washington [1976] 2 Lloyd's Rep. 453 (Fed. Ct. T.D.). Concerning the onus of proof and concurrent causes, see Tetley, at p. 173 and First Report of the Secretary-General, at p. 291.

Para. 3. In Maxine Footwear v. Canadian Gov't Merchant Marine (1959), 21 D.L.R. (2d) 1; [1959] 2 Lloyd's Rep. 105; [1959] 2 All E.R. 740; [1959] A.C. 589; [1959] 3 W.L.R. 232 (Pr. Co.), the interaction between the fire provision and seaworthiness is noted, and see Tetley, at pp. 184 and 188. Comments on the nature of fault and privity of carrier are from W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p. 116 and the leading case of Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705. In the lower court decision in Maxine Footwear [1956] Ex. Ct. R. 234, at p. 245 the Court, relying on a statement in Scrutton, (now) (18th ed.), at p. 236, found the onus to be on the carrier. A similar result although in obiter, was reached by the Trial Judge in Norman v. C.N.R. (1980), 27 Nfld. and P.E.I.R. 451, at p. 514. Tetley, at pp. 185-186 and 189 indicates that it is the cargo owner who must show actual fault or privity in order to

prevent the carrier from relying Article IV (2) (b).

Para. 4. The general definition of "perils of the sea" is from Tetley, at p. 196 and Charles Goodfellow Lumber v. Verreault (1970), 17 D.L.R. (3d) 56; [1971] S.C.R. 522; [1971] 1 Lloyd's Rep. 185 (S.C.C.). A general discussion of perils of the seas can be found in Tetley, at pp. 195-208; Carver, (12th ed.) at paras. 157-171; Scrutton, (18th ed.) at pp. 225-231, and Astle, supra para. 3, at pp. 119-125. Concerning what the carrier must show, see The Washington, supra para. 2; Tetley, at pp. 197-198, 207 and First Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973 at p. 149.

Para. 5. The common law burden of proof has been discussed under Care of Cargo supra Section C, para. 1, and the reference note to that paragraph. See in particular Scrutton, (18th ed.), at p. 437; Gamlen Chemical Co. v. Shipping Corporation of India Ltd. [1978] 2 N.S.W.L.R. 12 (C. of A.) and Payne and Ivamy Carriage of Goods by Sea (11th ed.) (London, Butterworths, 1979), at pp. 175-176. The comments in this paragraph are drawn from First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at pp. 288-290 and Robert Hellawell, "Allocation of Risk Between Cargo Owner and Carrier" (1979), 27 Am. J. of Comp. L. 357, at pp. 360-361.

Para. 6. The definition of a "strike" has evolved overtime as situations have changed, see Astle, supra para. 3, at pp. 137-138. In The Arawa [1977] 2 Lloyd's Rep. 416, (Q.B. Div.), appealed on another point [1980] 2 Lloyd's Rep. 135. The Court held that Article IV (2) (j) was broad enough to include a work slowdown or partial labour stoppage. The leading Canadian case is Crelinsten Fruit Co. v. The Mormacsaga [1969] 1 Lloyd's Rep. 515; [1969] 2 Ex. C.R. 215 (Ex. Ct.), and see "Bills of Lading", Report by the Secretariat of UNCTAD, supra para. 2, at p. 41. In The Arawa, supra, the goods were damaged due to improper care during the slow down, but there was no negligence on the part of the carrier, nor was it personally at fault for the stoppage. See Astle, at p. 146. Generally on the responsibilities of the carrier faced with a strike bound port, see Astle, at pp. 139-147.

Para. 7. For comments on the meaning of insufficiency of packing, see Scrutton, (18th ed.), at p. 436; Astle, supra para. 3, at pp. 168-169 and Tetley, at p. 227. The leading Canadian case of packing and automobiles is Nissan Automobile Co v. The Continental Shipper [1976] 2 Lloyd's Rep. 234 (Fed. Ct. A.D.), and see the discussion in Tetley, at pp. 235-236. On the issue of packing and theft, see Astle, at pp. 170-171 and "Bills of Lading," Report by the Secretariat of UNCTAD, supra para. 2, at p. 42. In relation to estoppel and also the special situation of containers, note Tetley, at pp.



228-230 and 232; Carver (12th ed.), at para. 288; Astle, at p. 166, and see Guadano v. The SS. Cape Vincent [1973] F.C. 726 (Fed. Ct. T.D.). Concerning the problems relating to the notation on the bill of lading, see "Bills of Lading", supra Section A; Tetley, at pp. 230-231 and "Bills of Lading", supra at p. 42. For a discussion on the final point noted, see Carver, (12th ed.), at para. 288; Scrutton, (18th ed.), at p. 436; and Tetley, at pp. 237-238.

Para. 8. The comments in this paragraph are drawn from Tetley, at pp. 211-215 and Carver, (12th ed.), at para. 289. On estoppel note also Astle, supra para. 3, at p. 174. The Hague Rules Articles III (5) and IV (6) are discussed infra Chapter IV.A and B.

Para. 9. Article IV (2) (n) also includes that the carrier can avoid liability where there is wastage in bulk or weight. This is fully discussed in Astle, supra para. 3, at pp. 151-154. The meaning of hidden defect and inherent vice is discussed by Tetley, at pp. 219-221. The Canadian case mentioned is The Hoyanger (1979), 31 N.R. 82 (Fed. Ct. A.D.). The comments on the burden of proof are from Tetley, at pp. 222-224, "Bills of Lading," Report of the Secretariat of UNCTAD, supra para. 2, at p. 41, and also John Trading v. Turbull Scott Shipping Co. [1967] 1 Lloyd's Rep. 1 (Q.B. Div.) and the discussion of this case in Astle, at p. 162. Concerning estoppel, see Tetley, at pp. 222 and 224; "Bills of Lading", Report of the Secretariat of UNCTAD, supra para. 2, at p. 41; and Astle, at p. 165.

Para. 10. General comments on exception (i) are in Tetley, at p. 215; Carver, (12th ed.), at para. 287; and "Bills of Lading," Report of the Secretariat of UNCTAD, supra para. 2, at p. 40.

Para. 11. The meaning of latent defects is discussed in Scrutton, (18th ed.), at p. 436; Carver, (12th ed.), at para. 290; and Tetley, at pp. 239-240. General comments concerning latent defects can be found in Tetley, at pp. 240-241 and "Bills of Lading," Report of the Secretariat of UNCTAD, supra para. 2, at p. 43. The British case is The Hellenic Dolphin [1958] 2 Lloyd's Rep. 3365, at p. 343 (Q.B. Div.) and see comments of Scrutton, at p. 436 and Carver, at para. 290.

Para. 12. The argument for the sweeping effect of paragraph (q) is in Astle, supra para. 3, at pp. 183-184. Concerning the broad interpretation to be given "other causes", see Astle, at pp. 184-185 and Tetley, at pp. 245-246. The better position regarding inexplicable loss is in Tetley, at pp. 246-247 and cited in "Bills of Lading," Report of the Secretariat of UNCTAD, supra para. 2, at p. 43, and see Scrutton, (18th ed.), at p. 438. On the definition of servants or agents in paragraph (q), see Astle, at pp.



185-189; Tetley, at pp. 248-250; and Scrutton, at p. 438.

Para. 13. See the discussion in Servatns of Carriers and Independent Contractors supra Chapter II.A. 3 and 4.

Para. 14. The British case is Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co. [1959] A.C. 133; [1958] 2 W.L.R. 688; [1958] 1 All E.R. 725; [1958] 1 Lloyd's Rep. 73 (H. of L.), and see Carver, (12th ed.) at para. 226 and Scrutton, (18th ed.), at p. 435.

Para. 15. The comments in this paragraph are from "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Document TD/B/C.4/ISL/19, 30 October 1975, at pp. 18-19.

Para. 16. On the decision to adopt liability based on fault, and to adopt the general approach of the other transport conventions, see Report of the Working Group (Third Session), UNCITRAL Ybk., Vol. III, 1972, at p. 262 and Hellawell, supra para. 5, at p. 358.

Para. 17. The comments on the burden of proof are from First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at pp. 302-303; Report of the Working Group (Third Session), UNCITRAL Ybk., Vol. III, 1972, at 262-263; Report of the Working Group (Fourth Session), UNCITRAL Ybk., Vol. IV, 1973, at p. 141; "Bills of Lading - Comments on a Draft Convention," supra para. 15, at p. 21; "Working paper by the Secretariat, Annex I," Second Report of the Secretary - General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 150-152; and Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975), 7 J. of Maritime L. and Comm. 69, at p.103. Concerning Article 5 (7) and concurrent causes, see D.E. Murray, "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at p. 65 and Hellawell, supra para. 5, at p. 362.

Para. 18. The comments in this paragraph are from Hellawell, supra para. 5, at pp. 364-365 and First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 292.

Para. 19. Concerning "friction", see Hellawell, supra para. 5, at pp. 365-366 and First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at pp. 294-295.

Para. 20. The reasons for deletion of the fire provision and for the modification of the navigation and management provision to conform with the liability based on fault policy of Article 5 (1) are discussed in First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at pp. 300-301.

Para. 21. The arguments for retention of the navigation exception are discussed in Report of the Working Group (Fourth Session), UNCITRAL Ybk., Vol. IV, 1973, at p. 140 and Sweeney, supra para.17, at p. 104.

Para. 22. On reasons given for retention of the fire exception, see Report of the Working Group (Fourth Session), UNCITRAL Ybk., Vol.IV, 1973, at p. 140.

Para. 23. On the effect of the Hague Rules and overlapping insurance, see "Bills of Lading," Report by the Secretariat of UNCTAD, supra para. 2, at pp. 28-29. The reasons for the cargo owner to continue to carry insurance are found at Sweeney, supra para.17, at p. 108 and First Report of the Secretary-General UNCITRAL Ybk., Vol. III, 1972, at p. 293. The increased costs of shipping goods argument is noted in Report of the Working Group (Fourth Session), UNCITRAL Ybk., Vol. IV, 1973, at p. 140; M.J. Shah, "The Revision of the Hague Rules on Bills of Lading within the UN System - Key Issues," in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at p. 11; and Tetley, "Canadian Comments on the Proposed UNCITRAL Rules - An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime L. and Comm. 251, at p. 255. The conclusion on the uncertainty concerning whether shipping costs will increase are from Hellawell, supra para. 5, at pp. 366-367. Many of the problems discussed in this paragraph are elaborated upon in Erlig Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981), 12 J. of Maritime L. and Comm. 299, in particular, concerning overall insurance and transport costs, see pp. 316-317.

Para. 24. The comments in this paragraph are drawn from an extended discussion of the issues in the article by Selvig, supra para. 23.

Para. 25. The package agreement reached on the limitation amount, the fire provision, negligent navigation and wilfull misconduct is described in Joseph C. Sweeney, "Article 6 of the Hamburg Rules" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 163-164. Discussion of the Hamburg Rules fire provision can be found in Murray, supra para. 17, at pp. 63-64; Hellawell, supra para. 5, at pp. 362-363; Tetley, supra para. 23, at p. 266; John A. Maher and Joan D. Maher, "Marine Transport, Cargo Risks, and the Hamburg Rules - Rationalization or Imagery?" (1980), 84 Dickinson Law Review 183, at pp. 208-209; and Tetley, "The Hamburg Rules - A Commentary" [1979] Lloyd's Maritime and Commercial L.Q., at p. 9.

Para. 26. For a discussion of the points noted in this

paragraph, see Hellawell, supra para. 5, at pp. 358-359 and "Working Paper by the Secretariat, Annex I," Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 155.

Para. 27. The problem of old case law is expressed in "Bills of Lading - Comments on a Draft Convention," supra para. 15, at p. 24. Concerning the retention of 'the exceptions in spirit, see Tetley, supra para. 23, and at p. 260. The reference to due diligence and seaworthiness is in the discussion of Seaworthiness of Ship, supra, Section B, para. 14. The author noted is Hellawell, supra para. 5, at p. 359.

THE FUTURE OF CANADIAN CARRIAGE  
OF GOODS BY WATER LAW

(A Study of the Hague Rules, the Hague/Visby  
Rules, and the Hamburg Rules on the Carriage  
of Goods by Sea.)

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DALHOUSIE OCEAN STUDIES PROGRAMME  
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## DOSP STUDY TEAM

The Dalhousie Ocean Studies Programme -- "New Directions in Ocean Law, Policy and Management" -- is a marine affairs research institute established in 1979. Initially funded for five years by the Social Sciences and Humanities Research Council of Canada, DOSP's objective is to establish itself as a permanent centre of excellence on ocean law, policy and management. The team for this study consisted of the following DOSP personnel.

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Terms of Reference for a Study to Review  
the Carriage of Goods by Water Act of Canada

1. To review the "Carriage of Goods by Water Act" to determine whether changes to the Act, if any, are required in view of current acceptance and status of the Hamburg Rules by some countries in lieu of the Hague Rules which, though never ratified by Canada, were adopted and appended to the Act as a "Schedule of Rules Relating to Bills of Lading".
2. To determine whether references to certain sections of the Canada Shipping Act presently contained in the Carriage of Goods by Water Act requires amendment in view of the fact that the Canada Shipping Act is in itself under review and will be replaced by the Maritime Code.
3. To determine whether reference to the Transportation of Dangerous Goods Act should be included in the Carriage of Goods by Water Act.
4. To determine the effect of any proposed changes as reflected in the Hamburg Rules on the Act as they relate to:
  - a) the effect of the change in scope of application;
  - b) the reduction of carriers exceptions;
  - c) the removal of exception for negligence in navigation;
  - d) the effect of presumed fault or neglect of carrier;

- e) the ability to pursue cargo claims at the port of destination;
- f) period of responsibility of carrier;
- g) the effect on carriers liability-period of liability, raising of limits of liability contract of carriage and carriage of goods by sea or bill of lading;
- h) the effect of carriers reservations clause.

The first four items of the terms of reference to be completed in their entirety. The balance of the work to be presented as an overview only.

5. To determine the effect of new rules on Canadian Transportation System in national and international context and the impact on existing commercial practices in Canada.
6. To determine the effect of implementation of the proposed new conventions on national and international competition for Canadian commerce and trade practices in Canada as well as upon U.S. trade implications.
7. To determine the attitude of major trading partners to the Hamburg Rules.
8. To recommend any changes/amendments that might be considered necessary to provide for any other contingencies that might arise.

## TABLE OF CONTENTS

Table of The Carriage Rules .....	xi
Preface and Acknowledgements .....	xv
I INTRODUCTION .....	1
II APPLICATION AND SCOPE OF THE RULES .....	5
A. To Whom The Rules Apply .....	5
1. Carriers .....	6
2. Cargo Owners .....	12
3. Servants of Carriers .....	16
4. Independent Contractors .....	20
B. When The Rules Apply .....	24
1. Contracts of Carriage .....	26
2. Charterparties .....	33
3. Geographic Scope .....	36
4. Period of Responsibility .....	47
5. Through Carriage .....	58
C. To What The Rules Apply .....	69
1. Deck Cargo .....	71
2. Live Animals .....	80
3. Goods and Packaging .....	83
4. "Particular Goods" and the Coasting Trade .....	85
D. How The Rules Apply .....	90
1. Exclusive Code .....	90
2. Interaction with Other Laws .....	95
3. International Uniformity .....	101
III RESPONSIBILITIES OF CARRIERS .....	103
A. Bills of Lading .....	104
B. Seaworthiness of Ship .....	125
C. Care of Cargo .....	140
D. Exclusion of Liability .....	148
E. Deviation .....	178
F. Delay .....	184
G. Limitation of Liability .....	190

IV	RESPONSIBILITIES OF CARGO OWNERS .....	229
	A. Description of Cargo .....	230
	B. Dangerous Goods .....	236
	C. Exclusion of Liability .....	242
V	CLAIMS AND ACTIONS .....	245
	A. Notice of Loss .....	246
	B. Limitation of Actions .....	251
	C. Jurisdiction .....	256
	D. Arbitration .....	261
	E. General Average .....	265
VI	GENERAL OVERVIEW OF COMMERCIAL ASPECTS OF ADOPTING THE HAGUE/VISBY RULES OR THE HAMBURG RULES .....	269
VII	SUMMATION OF LEGAL IMPACTS OF ADOPTING THE HAGUE/VISBY RULES OR THE HAMBURG RULES .....	299
VIII	CONCLUSION: THE CHOICE OF FUTURE WATER CARRIAGE LAW .....	323
	APPENDICES .....	327
	Appendix A: United Nations Convention on International Multimodal Transport of Goods .....	329
	Appendix B: Carriage Under Waybills .....	333
	Appendix C: Constitutional Jurisdiction Over the Water Carriage of Goods .....	351
	Appendix D: Delivery Provisions of the Canada Shipping Act .....	353
	Appendix E: Table of Limits of Liability Under The Rules .....	362
	Appendix F: Comparative Table of Limits of Liability by Country .....	363
	Appendix G: Comparative Survey of National Attitudes to the Choice of Rules .....	371
	SELECTED BIBLIOGRAPHY .....	387



## TABLE OF THE CARRIAGE RULES

### Carriage of Goods by Water Act:

Section	Section of Report
2	II.B.3
3	III.B
4	II.B.3
5	II.C.4
6	III.A and IV.A
7(1)	II.D.2, III.G and IV.B

### Hague Rules:

Article	Section of Report
I(a)	II.A.1
I(b)	II.B.1 and 2
I(c)	II.C.1, 2 and 3
I(d)	III.B
I(e)	II.B.4
II	III.C
III(1)	III.B
III(2)	III.C
III(3)	III.A
III(4)	III.A
III(5)	IV.A
III(6), para. 1, 2, 4	V.A
III(6), para. 3	V.B
III(7)	III.A
III(8)	II.D.1
IV(1)	III.B
IV(2)	III.D
IV(3)	IV.C
IV(4)	III.E
IV(5)	III.G
IV(6)	IV.B
V, para. 1	II.D.1
V, para. 2	II.B.2 and V.E
VI	II.C.4
VII	II.B.4
VIII	II.D.2 and III.G
IX	III.G
X	II.B.3

### Hague/Visby Rules (amended articles only):

Article	Section of the Report
III(4)	III.A
III(6), para. 4	V.B
III <u>bis</u> (6)	V.B
IV(5)	III.G
IV <u>bis</u> (1)	III.G
IV <u>bis</u> (2)	II.A.3, 4 and III.G

IV bis (3)  
IV bis (4)  
IX  
X

III.G  
III.G  
II.D.2  
II.B.3

Hamburg Rules:

Article

1(1)  
1(2)  
1(3)  
1(4)  
1(5)  
1(6)  
1(7)  
1(8)  
2(1)  
2(2)  
2(3)  
2(4)  
3  
4  
5(1)  
5(2)  
5(3)  
5(4)  
5(5)  
5(6)  
5(7)  
6(1) (a) (c)  
6(1) (b)  
6(2) - (4)  
7(1)  
7(2)  
7(3)  
8  
9  
10  
11  
12  
13  
14  
15(1) (a)  
15(1) (b) - (o)  
15(2) - (3)  
16  
17  
18  
19(1) - (4)  
19(5)  
19(6) - (8)  
20  
21  
22

Section of Report

II.A.1  
II.A.1  
II.A.2  
II.A.2  
II.C.2 and 3  
II.B.1  
II.B.1 and III.A  
II.B.1  
II.B.3  
II.B.3  
II.B.2  
II.B.1  
II.D.3  
II.B.4  
III.B, C and D  
III.F  
III.F  
III.D  
II.C.2  
III.E  
III.D  
III.G  
III.F and G  
III.G  
III.G  
III.A.3, 4 and III.G  
III.G  
III.G  
II.C.1  
II.B.5  
II.B.5  
IV.C  
IV.B  
III.A  
III.A and IV.B  
III.A  
III.A  
III.A  
IV.A  
II.B.1  
V.A  
III.F and V.A  
V.A  
V.B  
V.C  
V.D

Hamburg Rules (Cont'd)

23  
24  
25  
26

II.D.1  
V.E  
II.D.2  
III.G



## Preface and Acknowledgements

This report is a comparative review of the Carriage of Goods by Water Act, which gives effect to the Hague Rules on ocean carriage. The principal purpose in undertaking the review was to provide a comprehensive legal analysis of the operative effects of the Act. A secondary function was to state a brief overview of its commercial impacts. These objectives were pursued by comparing the Hague Rules, as found in the Act, with the Hague/Visby Rules, 1968 and the Hamburg Rules, 1978 with a view to assessing the choice of water carriage law now before Canada.

Consequently the bulk of the report is a legal study of the carriage Rules. In this portion of the report the discussion proceeds from rule to rule. At the head of each section first the relevant Hague Rules and then the comparable Hague/Visby and Hamburg Rules are set out prior to analysis. The actual order of the report does not follow the numbered sequence of the Hague Rules, but is organized according to the subject matter.

To make this technical material accessible to a wide range of readers, each section of the report has been written in three parts. Immediately after the particular Rules set out for consideration is a "summary" in plain language of the "legal commentary" that follows it. Finally "references" are collected after the "legal commentary" by paragraph.



Consequently, it is possible to read each section of the legal analysis of the Rules at any one of three levels of increasing detail. Equally, one can choose to read the whole of the legal study in the report at one level, passing, say, from "summary" to "summary" without fear of missing its essential points and conclusions.

The remainder of the report sums up the commercial and the legal impacts involved in the choice of Rules by Canada. There follow several appendices on matters of Canadian law related to ocean carriage, or on comparisons of other states' reactions to the alternative Rules.

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E. DEVIATION

Hague Rules: Article IV (4)

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

Hamburg Rules: Article 5 (6)

The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

Summary

The Hague Rules permit the carrier to make a reasonable deviation in the course of the voyage. Provided it is reasonable, the carrier will not be liable for cargo losses as a result of the deviation. Nor will he lose the benefit of the exceptions in the Rules or the clauses of the bill of lading, such as those giving him liberty to change the port of discharge in the event of a strike.

Two examples of reasonable kinds of deviations are provided by the Rules. They are deviations to save life or to rescue property, though the latter is not considered reasonable by itself as it amounts to salvage. The consequences of an unjustified deviation are not explained in the Rules but generally it is treated as a breach of the carriage contract in such a fundamental way that the carrier will be liable to the full extent of the losses his action causes. The Hague/Visby

Rules will extend the benefit of liability limitation provided the carrier does not deviate with an intent to cause damage.

The Hamburg Rules will control deviations by their general provision for liability. Impliedly, reasonable deviation will be allowed. Saving life and taking reasonable measures to rescue property will expressly be permitted.

### Legal Commentary

1. Article IV (4) permits the carrier to make a reasonable deviation without losing benefit of the exemptions in the Hague Rules and the clauses in the bill of lading. Nor will he be liable for losses arising from the reasonable deviation. However, Article IV (4) is silent about the meaning of a reasonable deviation and the exact effect of an unjustifiable one. As a further complication, the route of carriage is not always specified in the bill of lading.

2. Deviation is understood to mean an intentional departure from the customary or contractual route or choice of routes. Whether a particular course of the ship amounts to a deviation quite often depends on the significance to be given to so-called "liberty clauses" inserted in the bill of lading that permit changes in the route or in the port of discharge. These clauses are generally considered to be valid and read with the contract as a whole so as to define the permissible contractual route. However, general liberty clauses have to be restrictively interpreted in order not to offend Article III

(8) and to be consistent with the carrier's obligation under Article III (2) to take reasonable care of the cargo. The approach taken to these clauses is to examine the deviation itself to determine its reasonableness considering all the circumstances.

3. Article IV (4) protects the carrier in cases of reasonable deviation, for which the test is said to be:

"what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive."

Two examples of reasonable deviation are contained in Article IV (4). They are deviations to save life or property. Little debate has arisen concerning deviations to save life, but it is general opinion that a deviation to save property alone is not permissible since it is essentially a salvage operation from which the carrier would gain while the cargo owner would suffer. The determination of whether a deviation is reasonable is a question of fact. A common situation entailing deviation occurs when a strike hits the port of discharge and the ship goes to a neighbouring port. Such a deviation is necessary and, therefore, reasonable.

4. The burden of proof of deviation is not clearly the responsibility of either the carrier or the cargo owner. The probable rule has been described as requiring the carrier to

show that the route taken was the contractual or customary route. It is then up to the cargo owner to present evidence that the carrier intended to deviate from the customary or contractual route. Thereafter the carrier must show that the deviation was reasonable. It is at least clear that the deviation must have been intentional and not merely a case of negligent navigation or faultless over-carriage. The practical way to obviate the burden of proof is to press both sides to present all the evidence that is available to them.

5. In an important Canadian case the master decided to enter a strike-bound port, rather than take advantage of a liberty clause that permitted deviation and so proceed to deliver the perishable cargo to Montreal, which was to be the final port of call. The vessel could not leave the strike-bound port and significant damage to the cargo ensued. The court determined that the carrier had failed to act with reasonable care and prudence in regard to the cargo and that in this situation there was a duty to deviate, which was not exercised.

6. The consequences of an unjustifiable deviation are unclear in Article IV (4), but it will be treated as constituting a fundamental breach of the carriage contract. As a result the carrier is not entitled to rely on the Article IV (2) exceptions or any exemptions in the bill of lading. Conflicting opinions have been expressed on whether the carrier would be able to rely on the limitation of liability article, Article IV (5), of the Hague Rules. The better view denies the

benefit of the Article to the carrier since the deviation excludes the applicability of all the rules. In light of the Hague/Visby Rules Article IV (5)(e), however, it appears that the limitation provisions will be applicable unless there was an "intent to cause damage", the burden of proof of which is on the cargo owner.

7. The drafters of the Hamburg Rules agreed that in most cases the question of deviation would be adequately covered by the general liability provision Article 5 (1). The burden of proof would be on the carrier to show that in a case of damage the carrier's deviation was reasonably necessary, as understood in Article 5 (1). The drafters, however, decided to include a provision respecting the saving of life and property at sea. This became Article 5 (6).

8. Article 5 (6) will excuse the carrier where the loss derives from measures to save life or from "reasonable measures" to save property. Reasonable is only used in regard to property because the concern for salvage is not as great in most cases as the interest in life. The onus will be on the carrier to show that the action taken in regard to property was reasonable. The phrase "except in general average" was added to make it clear that the carrier is not relieved of his obligation to make a general average contribution in situations where they are normally required.

#### References

Para. 2. The position put forward on general liberty clauses is supported by Carver, (12th ed.), at paras. 297-298;



Scrutton, (18th ed.), at p. 439, and Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 180-181. Tetley, at p. 356, takes the position that the general liberty clauses would be null and void by virtue of Article III (8).

Para. 3. The test of reasonable deviation is from Stag Line Ltd. v. Foscolo, Mango and Co. [1932] A.C. 328; Lloyd's L.R. 271 (H. of L.). Reasonable deviation is discussed in Carver, (12th ed.), at para. 296; Tetley, at pp. 351-354; and the Second Report of the Secretary-General, at p. 181 and W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at p. 194. On strikes and deviation, see Tetley, at pp. 358-359; and paragraph 6 and the notes thereto under Exclusion of Liability, supra Chapter III.D.

Para. 4. The leading authority on the burden of proof is Tetley, at pp. 335-356. Tetley has been cited in the Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 183 and "Bills of Lading", Report by the Secretariat of UNCTAD, U.N. Document TD/B/C.4/ISL/6/Rev.1, 1971, at p.44.

Para. 5. The case is Crelinsten Fruit Co. v. The Mormacsaga [1969] 1 Lloyd's Rep. 515; [1969] 2 Ex. Ct. R. 215 (Ex. Ct.), and see Tetley, at p. 359; Astle, supra para.3, at pp. 200-201 and Carver, (12th ed.), at para. 296.

Para. 6. The comments in this paragraph are from Scrutton, (18th ed.), at p.440; Carver, (12th ed.), at para. 299; Astle, supra para. 3, at p. 202; "Bills of Lading", supra para. 4, at p.44; Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 183; and David M. Sassoon and John C. Cunningham, "Unjustifiable Deviations and the Hamburg Rules", in S. Mankabady, The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp.172-173. On the effect of the Hague/Visby Rules see Tetley, at pp. 360-361 and Anthony Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial L.Q. 225, at pp. 246-247.

Para. 7. The work of the drafters of the Hamburg Rules is noted in Report of the Working Group (Fifth Session), UNCITRAL Ybk., Vol. IV, 1973, at pp. 209-210.

Para. 8. For a discussion of the points mentioned see "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea adopted by the United Nations Commission on International Trade Law (UNCITRAL)", U.N. Document TD/B/C.4/ISL/23, 18 June 1976, at pp. 8-9 and S. Mankabady, "Comments", at p. 57.

F. DELAY

Hamburg Rules: Article 5(2), (3)

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.
3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

Article 6 (1) (b)

The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

Article 19 (5)

No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

Summary

Delay in delivery is not expressly mentioned by the Hague Rules but has always been regarded as a breach of the carrier's obligation to treat the cargo properly and carefully. Economic, as well as physical, loss caused by delay is recoverable, the measure being the difference between the market values of the cargo when it arrived and when it should have been delivered. The claim for delay in delivery is often

associated with a deviation in the route. The carrier's liability is limited in the ordinary way unless the delay was caused by an unjustified deviation for which he is fully responsible for all losses caused.

Delay is treated by the Hamburg Rules as a distinct source of loss for which the carrier will be liable if he does not take all reasonable measures to avoid it. His obligation will be to deliver the goods by the contracted date, or, where none is agreed, within a reasonable time in the circumstances. The cargo owner will be able to assume the goods are lost if they are not delivered within 60 days of the expected time. If they are delivered late, he will have only 60 days in which to lodge his claim in writing. Claims for delay will be subject to their own limitation of liability. The carrier's liability will be limited to two and a half times the freight on the delayed goods but not so as to exceed the total freight under the contract. Whether this special rule of liability limitation will apply to all, or only economic, losses by delay is but one uncertainty about this complicated regime of the Hamburg Rules.

#### Legal Commentary

1. Although no specific provision is made by the Hague Rules for delay, no particular problems have been experienced in recovering damages for delay where proven by the cargo owner. Historically, damages for delay were awarded in the event of deviation. Under the Hague Rules responsibility for

loss resulting from delay in delivery is based upon the carrier's responsibilities under Article III (2) to "properly and carefully load..., carry..., and discharge the goods carried". Physical loss or damage from delay is treated in the same manner as other claims under Article III (2).

2. Economic loss resulting from delay is also recoverable under Article III (2), as well as Article II, so long as the claim arises "in relation to the loading..., carrying..., and discharge of such goods...". The burden is upon the cargo owner to show that the economic losses resulting from delay are sufficiently direct and foreseeable to be recoverable. The measure of economic damages is usually the difference between the "sound market value" on the day the cargo should have arrived less the "arrived sound market value" on the day of actual delivery. In all cases of loss resulting from delay the carrier is protected by the limitation of liability provisions in Article IV (5), except where the delay is a result of a deviation that amounts to a fundamental breach of the carriage. Further, clauses in the bill of lading that attempt to exculpate the carrier from liability for losses resulting from delay would be considered void by reason of Article III (8).

3. The Hamburg Rules treat delay as a separate source of injury apart from loss or damage resulting from other causes. The basic rule on liability, Article 5 (1), states that the carrier will be liable for losses resulting from delay in delivery unless he can show that reasonable measures were

taken to avoid its occurrence.

4. Article 5 (2) defines delay in delivery as occurring when the goods have not been delivered either at the time agreed upon in the contract of carriage, or, within the time when it would have been reasonable to expect delivery. Bills of lading do not usually refer to a time of delivery, therefore, the question of delay will commonly depend upon what is a reasonable time for delivery. It is unclear who will have the burden of showing whether the delivery occurred within a reasonable time although it appears that the cargo owners will have to make out at least a prima facie case of delay. This article has also been criticized for the possibility that a carrier may insert in the bill of lading an expected date of arrival that bears no resemblance to the day reasonably to be expected. This type of clause would constitute an agreement and would all but preclude the cargo owner from recovery for delay since the clause could stipulate any time at all.

5. Article 5 (3) of the Hamburg Rules enables the cargo owner to recover for the loss of the goods where they have not been delivered within 60 days of the time for delivery. The determination of the time for delivery is made according to Article 5 (2). The burden of proving the time for delivery and the expiration of 60 days appears to be upon the cargo owner. It should be noted that Article 19 (5) would exclude compensation where the notice of loss or damages resulting from delay is not made within 60 days of the goods being given the consignee.



6. Article 6 (1) (b) provides a special limitation of liability for delay. The carrier's liability is limited to two and a half times the freight payable on the delayed goods, but not exceeding the total freight payable under the carriage contract. Article 6 (1) (a) refers to liability of the carrier for injuries resulting from loss of or damage to the goods. The drafters intended Article 6 (1) (b) to apply to economic losses resulting from delay, although the wording may be interpreted otherwise.

7. The provisions of the Hamburg Rules on delay create a complicated regime that is notable for its obscurity compared to the relatively untroubled way that delay is handled at present under the Hague Rules.

#### References

Para. 1. The comments in this paragraph are from Tetley, at pp. 134-135; Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)" (1976), 7 J. of Maritime L. and Comm. 489, at pp. 488-490; and the Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at p. 143.

Para. 2. Concerning economic loss arising from delay, note the discussion in Tetley, at p. 135; Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at p. 143; Sweeney, supra para. 1, at p. 490; and Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Commercial L.Q. 1, at p. 9. On the application of Article IV (5), see Third Report of the Secretary-General, at pp. 146-147, and on the application of Article III (8), see "Bills of Lading", Report by the Secretariat of UNCTAD, U.N. Document TD/B/C.4/ISL/6/Rev. 1, 1971, at p. 48.

Para. 4. On delay in delivery and the onus of showing a reasonable time period, see Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at p. 146 and John A. Maher, Jr. and Joan D. Maher, "Marine Transport Cargo Risks and the Hamburg Rules - Rationalization or



Imagery?" (1980), 84 Dickinson L. R. 183, at p. 206. The criticism concerning the possible abuse of the agreement clause is noted in Tetley, "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime L. and Comm. 251, at p. 264.

Para. 5. Comments on Article 5 (3) can be found in S. Mankabady, "Comments", at p. 55; Tetley, supra para. 2, at p. 9; and Maher and Maher, supra para. 4, at p. 206.

Para. 6. On limitation of liability and delay, see Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at pp. 146-149; Tetley, supra para. 2, at p. 9; and Tetley, supra para. 4, at p. 264. Special note should be made of the U.S. declaration concerning physical damages caused by delay as falling under Article 6 (1) (a) and not 6 (1) (b), see Joseph C. Sweeney, "Article 6 of the Hamburg Rules," in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 161-162. Also note the comments in United Nations Conference on the Carriage of Goods by Sea: Official Records, U.N. Doc. A/Conf. 89/14 (New York, 1981), at pp. 250-254.

G. LIMITATION OF LIABILITY

Hague Rules: Article IV (5)

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be less than the figure above named.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Article VIII

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of vessels.

Article IX

The monetary units mentioned in these Rules are to be taken to be lawful money of Canada.

Carriage of Goods by Water Act: Section 7 (1)

Nothing in this Act affects the operation of sections 450 and 451 and sections 647 to 658, of the Canada Shipping Act, or the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

Hague/Visby Rules: Article IV bis

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier

in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

#### Article IV (5)

- a. Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.
- b. The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

- c. Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as

aforesaid such article of transport shall be considered the package or unit.

- d. A franc means a unit consisting of 65.5 milligrammes of gold and millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.
- e. Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result.
- f. The declaration mentioned in sub-paragraph a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
- g. By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph a) of this paragraph may be fixed, provided that no maximum so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.
- h. Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

Protocol of 1979 to Hague/Visby Rules: Article IV (5) (a) (d)

- (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or 2 units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.
- (d) The unit of account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in sub-paragraph (a) shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International

Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the preceding sentences may, at the time of ratification or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

- (a) in respect of the amount of 666.67 units of account mentioned in sub-paragraph a) of this paragraph, 10.000 monetary units;
- (b) in respect of the amount of 2 units of account mentioned in sub-paragraph a) of this paragraph, 30 monetary units.

The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrammes of gold of millesimal fineness 900'. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of the State as far as possible the same real value for the amounts in Article 4, paragraph 5, sub-paragraph a) as is expressed there in units of account.

States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument referred to in Article III and whenever there is a change in either.

#### Hamburg Rules: Article 6 (1)

(a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.



- (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.
2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this Article, the following rules apply:
- (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.
- (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.
3. Unit of account means the unit of account mentioned in article 26.
4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

## Article 7

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.
2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.



## Article 8

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

## Article 25 (1)

This convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

## Article 26

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.
2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability

provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogram of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.
4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this Article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in Article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion mentioned in paragraph 3 of this Article as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this Article, and whenever there is a change in the manner of such calculation or in the result of such conversion.

#### Summary

The Hague Rules protect the carrier from unrestricted liability for loss for which he is responsible by imposing a limit of C\$500 per package or unit, unless the nature and actual value of cargo is declared by the shipper on shipment or a higher limit is set by agreement. If the shipper knowingly misstates these matters, the carrier is not liable at all for the cargo damage he may cause as a result of this misinformation. The C\$500 limit is not uniform internationally and is so low in value today that it is causing severe difficulties.

There is still uncertainty about the meaning in practice of "package or unit". A package is something that is sufficiently packed to withstand the carriage, but can have no application to goods carried unpacked or to bulk cargoes. A unit may be of freight or of shipping. A shipping unit is commonly applied in Canada to unpacked goods but is unsuitable for bulk cargoes, which are measured in freight units. Generally Canadian courts look for the intention of the parties about the pieces of cargo. The information required to be stated on the bill of lading is very useful for this purpose, especially when containers are involved. The container itself or the individual items of cargo inside it may be packages however the carriage agreed by the parties seems to warrant.

Limitation of liability applies to all kinds of damage, physical and economic. The measure of compensation is normally the difference between the market value the goods would have had if delivered in good condition and on time, and their actual value on arrival, subject to the limit of C\$500 per package or unit. However, the carrier probably cannot rely upon this limitation if he is in gross or reckless breach of the Rules and of his contract. In every case, the Hague Rules permit local law to set overall limits to liability. In Canada, the Canada Shipping Act restricts the liability of the carrier, absent personal fault, and of his employees in any event, to 1,000 gold francs per ton of the ship.

The Hague/Visby Rules would revolutionize the provisions of the Hague Rules in an effort to set an indemnity for cargo

owners related to inflation, and to cope with the impact of containerized transport on the concepts of package and unit limitation. The limit would be set at 10,000 gold francs per package or unit, or 30 gold francs per kilo, whichever is the higher. The intent was to set an internationally uniform limit by reference to the foreign exchange markets, but since it would be left to local law to establish the domestic value of a gold franc and the world, meanwhile, has substantially abandoned the gold standard, the attempt is doomed. However, a further amendment of the Hague/Visby Rules, subsequent to the Hamburg Convention, was agreed by a Protocol of 1979. It expresses the limits of liability in terms of special drawing rights (SDRs) of the International Monetary Fund in an effort to overcome the difficulties presented by gold values. The amounts would be 667 SDRs per package or unit and 2 SDRs per kilo. Nevertheless, the new limits will still be considerably below those in other modes of carriage.

The introduction of alternative grounds for limitation, by item or by weight, will considerably ease the problems of identifying packages, units and bulk. In addition, many disputes over containerized cargoes will be avoided by treating the enumeration of parcels in the container, declared by the shipper, on the bill of lading as the number of packages for limitation purposes. The Hague/Visby Rules, confirm the practice under the Hague Rules, though with some significant constriction, that a carrier, who wilfully or recklessly damages cargo, will be denied the benefit of liability

limitation. They also try to set an internationally uniform method of calculating the compensation to be paid, which coincides with the market value principle already practised in Canada under the Hague Rules.

Before the revisions of the Hague Rules by international convention, private attempts had been made to set a higher limit of liability unrelated to gold. The British Maritime Law Association sponsored the Gold Clause Agreement between a great number of international shippers, shipowners and insurers. The agreement initially established a liability limit of 200 pounds sterling per package but, when the Hague/Visby Rules came into force in the United Kingdom, the sum was altered to 400 pounds sterling provided the Rules themselves did not apply to the claim. Hence, Canadian participants in the Gold Clause Agreement have the benefit of the higher limit when COGWA is the governing law of their contracts of carriage with other participants.

The Hamburg Rules adopt many of the revisions of the Hague/Visby Rules including the principles that liability limitation will be available to the carrier whatever the legal form of a claim made against him, and that it will be calculated in the alternative per package or "shipping" unit, or per weight, of cargo whichever is the higher. The Hague/Visby approach towards containerized goods is also adopted with the addition that the container itself, if supplied by the shipper, will be treated as a separate shipping unit.



The Hamburg limits will be 835 SDRs per package or 2.5 SDRs per kilogram. This unit of account was chosen in an effort to reflect fluctuating monetary values and to ensure ready convertibility into national currencies. These limits are 25 percent higher than the Hague/Visby agreements in 1968 and 1979 but will still be some of the lowest rates of compensation in world transportation. They may be raised by agreement between the parties, but will always be subject to the carrier's overall limit per his ship's tonnage. In Canadian estimates, 2.5 SDRs by weight will cover about 75 percent of Canada's overseas trade. A complete table of the limits of liability under the various sets of Rules, with rough conversions into Canadian dollars, is presented in Appendix E.

The benefit of liability limitation under the Hamburg Rules will be lost to the carrier if he wilfully damages the cargo or acts recklessly in disregard of its loss. There may be occasions, however, when the gross breach of the carrier, such as an unjustified deviation for which he would be prevented from limiting his liability as the Hague Rules are now applied, will not amount to wilfull or reckless conduct towards the cargo so as to exclude limitation under the Hamburg Rules. This restriction in the Hamburg Rules, copied from the Hague/Visby Rules, will be an unfortunate retraction from the operation of the law surrounding the Hague Rules.

#### Legal Commentary

1. Article IV (5) of the Hague Rules is the carrier's



protection from unlimited liability. It determines the amount of damages that the carrier will have to pay in cases of loss or damage to the cargo. Prior to the Hague Rules it was not uncommon for the bill of lading either to exclude liability completely or to reduce it to unconscionably low amounts. Article IV (5) was part of the overall bargain struck between the owners of ships and cargoes whereby the carriers are bound to maintain a certain level of cargo care in return for a restriction upon their total liability. Under the Canadian enactment of the Hague Rules, the carrier is limited to five hundred dollars Canadian per package or unit unless the nature and true value of the goods are declared by the shipper and made evident on the bill of lading. The concern of carriers was to prevent unrestricted claims on items of undeclared high value. Similarly, where the nature or value of the cargo has been knowingly misstated by the shipper, the carrier is not responsible for loss or damages.

2. The Canadian version of the Hague Rules is very definite that the Canadian dollar is the relevant monetary unit. Article IX, of the Brussels Convention expressed the unit of account to be gold value but permitted nations to adopt their own currency. The consequence has been a lack of international uniformity in limitation and a monetary amount in Canada that has remained unaltered in spite of inflation and devaluations up to the present when it is hardly significant.

3. As has been noted, the shipper can avoid the limitation of liability provisions by declaring the nature and

value of the goods prior to shipment and inserting them in the bill of lading. Such declarations and insertions would inform the carrier of any special care that needs to be taken of the goods. It appears that shippers have rarely taken advantage of this provision because carriers add ad valorem freight rates usually at such a percentage that the shippers find it cheaper to obtain their own insurance. It should be noted that the burden is on the cargo owner to show the true nature and value of the cargo declared since the insertion in the bill of lading is only prima facie evidence and not binding or conclusive on the carrier. Paragraph 4 exculpates the carrier where the nature or value of the goods have knowingly been misstated. This rule seems to contemplate situations where the unknown character of the cargo leads to damage through unwittingly improper stowage, or where, the high value of the cargo being declared, no special stowage and precautions are taken. It appears that the carrier would only escape liability where the loss or damage resulted by reason of the misdeclaration concerning the nature or value of the cargo.

4. The use of the limitation of liability provisions by servants, agents and independent contractors is discussed in an earlier portion of this report.

5. The most difficult problem over the application of Article IV (5) is the meaning to be given to "package or unit". A "package" refers to goods that have undergone a sufficient degree of packing so as to hold and protect them and to make their handling and transportation possible. Covering that is

solely for the protection of the goods does not constitute packing: they are not considered a package. Semi-packed goods cause most of the problems. Where there is no packaging or where semi-packed goods do not constitute a package, the limitation of liability will be based on the unit.

6. Considerable problems of interpretation have also arisen over the meaning of "unit". Two possible interpretations compete. The unit can be regarded as the shipping unit, which means a physical unit such as an unpacked piece of cargo. The unit may also be the freight unit, which is the unit of measurement applied to calculate the freight. Both interpretations create problems in applying Article IV (5). If shipping unit is the accepted approach, then it is unclear why package is used as an alternative to unit, since a shipping unit would include a package. Since a freight unit is usually based on weight or volume, a limitation so calculated will be higher than one based upon a shipping unit. Although some doubt has been expressed, there is no reason why Article IV (5) should not apply to bulk cargo. If it does, the use of shipping unit would make no sense and freight unit would be the only appropriate definition. There have been a series of Canadian cases relating to the definition of unit. In one case the Supreme Court of Canada considered an unboxed truck to be a shipping unit because the freight amount related to the truck and not to its weight. In a more recent Supreme Court of Canada case an unpacked tractor and generator were considered as shipping units, and freight units for unpacked goods were

specifically rejected. Interpretation of these cases vary. One authority has surmised that the freight unit "has been authoritatively rejected" in favour of the shipping unit, at least as regards items, like automobiles, that are not shipped in packages. Another commentator has concluded, as well as advocated, that the freight unit is the appropriate unit and, in most instances, is the same as the shipping unit, particularly in the cases noted above.

7. Article III (3) (b) requires the bill of lading to indicate "either the number of packages or pieces, or the quantity, or weight, as the case may be." The information in the bill of lading, therefore, should be quite useful in determining the intent of the parties as regards the meaning of package or unit. It is suggested that this examination of intention is a more valid approach to determining the meaning of package or unit than a physical examination of the cargo to see which is the most appropriate meaning to accept. Seeking the intention of the parties is an approach that has been used on goods in containers. This approach accords well with the suggestion of one author that the shipping unit be applied to individual articles not in packages and the freight unit to bulk cargoes. Article III (3) (b) is only prima facie evidence and not binding or conclusive against the carrier.

8. The use of containers has presented a major problem of interpretation of Article IV (5). The question is whether the container constitutes the package, or whether the packages within the container are to be considered separately for

limitation purposes. The leading Canadian case involves bicycles that were individually packed and placed in containers. The Court noted that the shipping documents described in detail the contents of the containers and that the carrier had accepted the documents without complaint. Also, the cartons containing the bicycles were self-contained: only as a matter of convenience were the bicycles shipped in a container. The court ultimately decided that the parties intended the bicycles to be separately assessed. In this case the shipper packed the containers. Where the carrier uses a container to send several individually received packages, they would certainly be the packages for limitation purposes. Where bulk cargo is loaded into a container, the container is a package. In determining whether a container packed by a shipper is a single entity, the criterion appears to be whether the description of the cargo is such as to indicate that individual packages are within the container. This description although not conclusive, is entitled to considerable weight so long as it is in accord with the intentions of the parties. An alternative approach to containers of goods is one developed in American case law and referred to as the "functional package test". The determination of the container as a package is made to depend on whether the individual packages are packaged in a way that would permit transportation. This test is not as easily applied or as adequate as the Canadian approach that tries to reflect the intention of the parties. It appears now to have been abandoned.



9. The prevailing view is that Article IV (5) acts as a limitation on all types of damage that result from a breach of the Hague Rules. This would include physical damage as well as economic loss. The rule of thumb in calculating damages for cargo claims is the difference between the market value the goods would have had on delivery in good condition and on time, and their actual value at arrival. If this amount is less than five hundred dollars per package or unit, the limitation provisions are inoperative. If the damages as calculated were to exceed the level of limitation, they are cut down to five hundred dollars per package or unit. In a recent Canadian case twenty-four steel angles were claimed as having been lost. Twelve angles constituted a lift and a lift was considered a unit. One entire lift was missing and four steel angles were missing from three other lifts. The value of a lift was \$1,440.78, with four pieces being worth \$480.13. The court concluded that the cargo owner was only entitled to recover \$500.00 for the completely missing lift, but was able to collect \$480.13 for each of the other three lifts from which four steel angles were missing. This result is unusual, although an accurate interpretation and application of Article IV (5).

10. The first sentence of Article IV (5) states that the limitation of liability provision should apply "in any event". As noted in the previous discussion of deviation, this phrase raises the question of whether the carrier can rely on the limitation of liability provision in all cases, regardless

of the nature of his breach of the Rules and of the contract of carriage. It has been pointed out that such an interpretation would permit a carrier to benefit by the Rules even when he operated in flagrant disregard of his obligations under them. It has also been suggested that once Article IV (5) is held not to apply in the face of flagrant violations, possibly every claim will have to be evaluated to determine whether the breach is of such a level and nature as to render the Article inapplicable. In spite of this possibility, it is suggested that the best interpretation to be given Article IV (5) is that in cases where the violation of the Hague Rules is sufficient to render them inapplicable, i.e., cases of undeclared deck cargo, unreasonable deviation or misrepresentation by the shipper of the value or nature of the shipment, Article IV (5) should also be inapplicable. Moreover, in cases of gross negligence or willful recklessness, the carrier should also not be able to take advantage of the limitation of liability provisions.

11. Article VIII of the Hague Rules and Section 7 (1) of COGWA indicate that the limitation of liability provisions in Article IV (5) are subject to specific provisions in the Canada Shipping Act. Section 450 (5) states that no liability shall attach to the master or owner of the ship where dangerous goods, sent in contravention of this section, are thrown overboard. Sections 647 and 649 limit the liability of the shipowner, the carrier, and operator of the ship in cases where damage or loss is caused to goods without their actual fault or

privity to 1,000 gold francs for each ton of the vessel's tonnage. The master, crew and servants of the owner, as well as of the vessel operator and of the charterer, may also benefit from this limitation of liability regardless of their personal fault. These provisions are generally consistent with the 1957 International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships. This convention was updated in 1976 by the Convention on Limitation of Liability for Maritime Claims, to which Canada is not a party and which is not in force. It should be noted that Section 647 (1) of the Canada Shipping Act defines the weight and fineness of gold francs but the Governor-in-Council specifies the method of calculating their Canadian dollar value.

12. Paragraph 3 of Article IV (5) provides that agreement may be reached on a maximum amount for liability that exceeds the five hundred dollar limit. This is the basis of validity of the so called Gold Clause Agreement of the British Maritime Law Association. In light of the uncertain value of 100 pounds gold, the limitation amount in the British enactment of the Hague Rules, an agreement was reached in 1950 amongst a very large number of both ship and cargo owners and insurers to set the limit of liability at 200 pounds sterling. Certain conditions were attached. Clearly any such agreement that calls for an amount less than the 500 dollar limit applicable in Canadian law is null and void under Article III (8). However, the Agreement seems to have been referred to only once in the courts and then approvingly. It has been suggested that

where the term "package" or "unit" is defined in the bill of lading so as to limit the carrier's liability to an amount less than the sum recoverable in the absence of the definition, it should also be treated as void under Article III (8).

13. In 1968 the drafters of the Hague/Visby Rules attempted to deal with what they perceived to be the major deficiencies of Article IV (5), namely, the limitation amount and the impact of new methods of transport, such as containers, on the uncertain definition of package and unit. The result of the drafters' efforts was a complete revision of Article IV (5). The new article retained some of the old language but also added several new concepts and new applications of old concepts.

14. Article IV (5) of the 1968 Hague/Visby Rules will raise the limitation amount to 10,000 gold francs per package or unit, or 30 gold francs per kilo of gross weight. Unlike the Hague Rules, which left nation states free to enact the limit of liability in their own currency, the Hague/Visby Rules at paragraph (d) fix the definition of a gold franc, so that a constant unit of account will exist. In fact, a franc under the Rules is expressed to contain the same weight and fineness of gold as a gold franc in Section 647 (1) of the Canada Shipping Act. The date of conversion of the franc to domestic currency is to be governed by local law. The hope was nation states would take the same approach towards conversion as Canada already has in her domestic legislation. This is also the approach taken by Great Britain in Section 1 (5) of the

1971 English Carriage of Goods by Sea Act. Since Canada does not apply the Hague/Visby Rules, no official conversion rate of the gold franc for their purposes has been made. However, as the Canada Shipping Act defines a gold franc similarly, the rate of exchange declared for its purposes may be a useful comparative guide. At present the translation is fixed at 15.075 gold francs to 1 SDR. An SDR is a special drawing right of the International Monetary Fund, which provides quotations of this unit of account in the national currencies of all participating countries, including Canada. At the beginning of 1982, 1 SDR very roughly equalled C\$1.50. Hence the limits of liability of 10,000 francs per package and 30 francs per kilo. approximately convert to C\$995 and C\$3 respectively. As it happens, the amount fixed by the Hague/Visby Rules is considerably below the limits set by other international transport conventions. As pointed out by one commentator, the objectives to be achieved by a limit of liability are: i) certainty; ii) international uniformity; iii) stability; and iv) a degree of protection against currency inflation. The continued use of the gold standard in the 1968 Hague/Visby Rules, in light of events surrounding international finance in the seventies, ensured that these objectives would not be met. This outcome, however, was probably not foreseeable in 1968. When the Hague/Visby limits of liability came into operation in the United Kingdom in 1977, by implementation of the British Carriage of Goods by Sea Act, 1971, the Gold Clause Agreement, referred to in paragraph 12, became outmoded. Hence, it was



amended so as to increase the carrier's liability to 400 pounds sterling per package amongst signatories, except when the Hague/Visby Rules apply. If one pound sterling is treated as equivalent to C\$2.25, the new limit of the Agreement provides C\$900 indemnity per package or unit for participating Canadian shippers and cargo insurers in their contracts of carriage under COGWA with participating carriers.

15. Paragraph (a) of Article IV (5) of the Hague/Visby Rules adopts an alternative limitation scheme, one for relatively light and another for heavy cargo. The scheme is intended to eliminate problems about the determination of package and unit, especially as regards bulk cargo. The bulk cargo problem will be eradicated. The definition of unit clearly will mean an unpacked item, although the opinion has been expressed that the difference between a shipping unit and a freight unit will still be important. Problems will still arise over unpackaged items whose weight is not included in the bill of lading, but is probably sufficient to make recovery greater than by unit limitation. Similarly, cargoes that are neither bulk nor full packages will still raise problems of characterization. In those cases it is suggested that recourse be made to the intention of the parties expressed in the bill of lading.

16. The Hague/Visby Rules Article IV (5) makes its most significant contribution about containers, pallets and like transports. Paragraph (c) states that if the bill of lading should indicate the number of packages in the container, then

that number shall be used to determine the limitation amount. Where no enumeration is made the container will be considered one package. The general intention is to provide the shipper with an option whether to treat the container, or each of the parcels in it as the relevant package or unit for limitation purposes. This option may have a fate similar to the opportunity in the Hague Rules Article IV (5) for the shipper to declare the value and nature of the goods so as not to be bound by the limitation amount. As has been noted, the shipper's option to avoid the limitation amount usually results in increased freight. It has been argued that if the shipper should exercise his option under the Hague/Visby Rules to apply the limitation amount to the individual packages in a container, the carrier will be entitled to calculate the freight, based on the number of packages and not on the container, at a higher rate. It appears that under the Hague Rules the freight rate does not rise where packages are enumerated in the bill and that a prime reason for use of containers rather than sending individual packages is to take advantage of the lower freight rate applicable. It has been concluded by one authority that the container clause in the Hague/Visby Rules will not permit increased freight rates solely because the shipper enumerates the number of packages on the bill.

17. Although paragraph (c) will solve a great many problems relating to containers, there will be a number of unanswered questions. One of the most significant will be the

problem of the form that the enumeration on the bill of lading is to take. Will a clause like "said to contain X cases" be adequate? Canadian container decisions have not been bothered by the "said to contain" clause and have determined that this shows the intention of the parties to have the individual packages used for limitation purposes. Previously in this report, it was indicated that a clause in the bill of lading like "said to contain" would not act as a reservation or an estoppel under Articles III (3) and (4). The court decisions suggest that a "said to contain" clause will be a sufficient enumeration on the bill of lading to allow the limitation provision to apply to individual packages. The enumeration is not binding or conclusive against the carrier so that where it is incorrect, it seems liability will be based on the accurate number and the limitation on the inaccurate number on the bill of lading. This result is silly: the limitation should correspond with the liability. The Hague/Visby Rules leave unanswered the question whether the container itself, when supplied by the shipper, should be considered as a package. Still another unanswered problem will concern a container in which only some of the contents are enumerated. Are the items singled out entitled to individual package limits and the rest subject the weight limit? Whether the alternative limits will be so combinable is unclear.

18. Article IV (5) will deny the carrier the benefit of limitation when he is shown by the cargo owner to have behaved "with intent to cause damage, or recklessly and with knowledge

that damage would probably result". Although some doubt exists, it appears that the paragraph only applies to the carrier himself and not to his servants or agents. If so, the utility of the paragraph will be restricted. The onus will be on the cargo owner to show that the carrier subjectively intended to damage the cargo or was reckless and knew that damage would probably result. Clearly this onus will be extremely difficult to discharge.

19. Paragraph (e) will have to be applied in conjunction with paragraph (a) which indicates that the carrier's limitation of liability is available "in any event". It seems therefore that the carrier will lose his liability limitation only on the grounds prescribed by paragraph (e). These are much narrower than the restraints on the Hague Rules Article IV (5) discussed in paragraph 10 above. Although limitation will only be denied per paragraph (e), the effects of a fundamental breach of the carriage contract, such as deviation, on the carrier's defences under Article IV (2) will remain the same.

20. The calculation of damages is usually a question of municipal law. Article IV (5) of the Hague/Visby Rules, however, makes an attempt to provide some uniformity in these calculations for carriage claims. However paragraph (b) is ambiguous. It has been argued that the provision should be read so that the total amount recoverable will be calculated only by reference to the value of the goods determined through the commodity exchange, the current market price or the normal price for an equivalent item, at the time of discharge. Read

so literally, it would rule out the recovery of damages for delay and for other foreseeable losses that are economic in nature. In discussing the recovery of damages for delay it has been noted that Article IV (5) of the Hague Rules permits the carrier to limit his liability for economic losses. The critical wording, - "damage to or in connection with goods", - in Article IV (5) persists in the Hague/Visby Rules. It is reasonable to assume that specific wording would be required to prevent such recovery. The better view concerning the interpretation of paragraph (b) is that it lays down a prima facie measure of damages that need not be followed in inappropriate circumstances. It should be noted that the market value rule expressed in paragraph (b) is equivalent to the Common Law rule developed under Article IV (5).

21. The drafters of the Hamburg Rules adopted several of the provisions of the Hague/Visby Rules during their deliberations about an appropriate compromise on limitation of liability. One such instance is Hague/Visby Rules Article IV bis (2) where it is stated that the limitation amount will benefit carriers regardless of whether the action against them is framed in contract or tort. This provision is repeated in substance in the Hamburg Rules Article 7 (1). Article IV bis (2) of the Hague/Visby Rules and Article 7 of the Hamburg Rules will also extend this principle to servants and agents in the ways previously discussed. The goal in these provisions is to ensure that the liability limitation cannot be circumvented by an action outside the carriage contract. The inclusion of



these ideas in the Hamburg Rules has been described as "great advances in the law of carriage by sea". They will, however, merely bring the carriage rules in line with the recent trends in international commercial legislation.

22. One of the major decisions made by the drafters of the Hamburg Rules was the retention of the dual limitation scheme first introduced in the Hague/Visby Rules. Article 6 (1) (a) bases limitation of liability on either package or shipping unit or gross weight whichever is the higher. The use of the phrase "shipping unit" will obviate confusion with "freight unit" that exists with the unmodified term "unit" in the Hague Rules.

23. The drafters of the Hamburg Rules, in Article 6 (2) (a), also adopted the approach on containers taken in the Hague/Visby Rules. Article 6 (2) (b) will clear up one problem left over by the Hague/Visby Rules Article IV (5) in that the container itself, when supplied by the shipper, will be considered as a separate shipping unit. As the Hague/Visby Rules provide, where the goods within a container are enumerated in the bill of lading, each item will be treated separately for limitation purposes. It has been suggested previously that this practice could result in increased freight. The enumeration of contents could also have two other adverse effects. First, it might increase pilferage because thieves could determine which container held valuable goods. Second, it might lead to the carrier requiring more insurance since his liability will be greater. There will continue to be

problems in the interpretation of this provision since it is unclear what the phrase "enumerated" contents, or "similar article of transport" to a container may mean. The effect of a notation such as "said to contain" through Article 16 has been referred to previously. In total, however, the container provision is a significant improvement on the Hague Rules.

24. The Hamburg Rules have omitted reference to a shipper's declaration of cargo so as to establish full value liability but it will be still possible, through Article 6 (4), to fix higher limits by agreement between the carrier and the shipper. The change is not regarded as significant.

25. The two key issues before the drafters of the Hamburg Rules concerned the level and form of limitation and the occasions when it would be denied. Article 26 adopts the Special Drawing Right (SDR) of the International Monetary Fund (I.M.F.) as the unit of account for limitation of liability purposes. The choice followed the decision by the Inter-Governmental Maritime Consultative Organization (IMCO) to use SDRs in the Convention on Limitation of Liability for Maritime Claims, 1976. For those states not members of the I.M.F. a complicated formula based on gold is included in Article 26 which will have a similar result to making the SDR the unit of account. It was hoped that the SDR, being based on a basket of currencies, would more accurately reflect real value and would be more easily convertible than units of gold. The drafters of the Hamburg Rules did not address the problem of value in a thorough way with the result that even using the

SDR the limitation amount will decline in real terms. The second sentence of Article 26 (1) indicates that the limitation amount is to be determined at the date of judgement, as opposed to the date of payment, or at a date agreed upon (possibly in the bill of lading) by the parties. The I.M.F. publishes daily values of most international currencies. This value reflects market value and not the official exchange rate between the I.M.F. and the country involved. Presumably it is these published reports to which a court would resort on the day of judgement to express the SDR limit in the Hamburg Rules in terms of the national currency involved.

26. The actual limitation amount to be employed in the Hamburg Rules was part of the the compromise of viewpoints reached by the Conference participants. The issues involved in the deal were the limitation amount, unbreakable limits, and the nautical fault and the fire defences. "Finally, agreement was achieved on 2.5 SDR with an obfuscated fire defence (Art. 5 (4)), no nautical fault and unbreakable limits (Art.8)." The figure of 2.5 SDRs refers to the weight limitation. This was much more crucial at the Hamburg Conference than the package limitation, which was set at 835 SDRs. Applying the same exchange rate of 1 SDR to C\$1.50 as used with the Hague/Visby Rules in paragraph 14, the Hamburg units will convert to C\$1,250 per package and C\$3.75 per kilo. The Hamburg limits appear to be about 25% higher than those in the 1968 Hague/Visby Rules although in real terms they are only about 60% of monetary values. It has been pointed out that 2.5 SDRs

per kilo "will be one of the lowest limits in world transportation." The amount that a cargo owner will be able to recover will also be subject to the Hamburg Rules Article 25 (1), which respects both national and international regulation of overall limitation by ship's tonnage. The effect will be substantially the same as the present position under COGWA described in paragraph 11.

27. In 1979 a further Protocol to the Hague/Visby Rules changed the unit of account in Article IV (5) to the SDR. the purpose of the change is to overcome the vagaries of relying on the gold standard as discussed in paragraph 14. The wording of the 1979 Protocol Article IV (5) concerning the conversion of SDRs into national currency is substantially the same as the Hamburg Rules Article 26. The 1979 Protocol expresses the limits under Article IV (5) as 666.67 SDRs per package and 2 SDRs per kilo. These limits are still about 25% lower than those of the Hamburg Rules. A complete comparative table of limitation amounts is included in Appendix E.

28. At the Hamburg Conference, Canada argued that the limitation amount should cover potential loss in respect of a fair and reasonable proportion of damageable cargo shipped. The Canadian delegation had in mind containerized goods since this is the cargo most likely to be damaged. Canada noted that, if approximately 70 to 75 percent of containerized cargo were to be covered by the limitation amount, it should be, in Canadian money, between \$4 and \$5 per kilo. This sum was approximately equivalent to 3.3 SDRs in 1978. The agreed

figure of 2.5 SDRs was estimated to cover roughly 75 percent of aggregate Canadian overseas trade and approximately 60 percent of Canada's containerized trade.

29. The limits established in Article 6 (1) will be set aside if the claimant can show that his loss as a result of an act or omission of the carrier was done with intent to cause such loss or recklessly with knowledge that the loss would probably result. The principle parallels the Hague/Visby Rules and clearly will put a very substantial burden of proof on the cargo owner. Article 8 (2) of the Hamburg Rules, like the Hague/Visby Rules Article IV bis (4), will extend the principle against the carrier's servants and agents who seek the benefits of limitation under Article 7 (2). One problem that is unforeseen within the drafting of Article 8 concerns theft by a servant or agent. Pilferage is clearly beyond the scope of employment of servants and agents, who will not then be able to take advantage of the limitation of liability. This result is illusory because the errant employee will not usually be around to respond to the cargo owner's claim. The carrier, however, will only be liable for the limited amount, and may thus be encouraged to exercise lower standards in his care for the goods and in the hiring of his employees.

30. The major question that Article 8 will pose in Canada concerns the Common Law doctrine of fundamental breach of contract. If the carrier should breach the Rules in a fundamental way wilfully, or recklessly and knowingly, causing damage then he will deservedly be denied the benefit of



liability limitation under Article 6 by the operation of Article 8. But usually a fundamental breach is not committed with intentional or even reckless disregard of the cargo. Normally the breach results from an act of the carrier in pursuit of his own benefit. For instance, a deviation to take on cheap bunkers is an unjustified and fundamental breach which probably places the carrier outside the protection of the Hague Rules, including the right in Article IV (5) to limit his liability. But such a deviation can hardly be said to satisfy the stringent criteria of the Hamburg Rules Article 8 on the loss of the benefit of limitation. The best interpretation of this Article in cases of fundamental breach would appear to permit the carrier to rely upon his right to limitation unless the cargo owner can bring the offending acts within its strict confines. In this respect the Hamburg Rules will alter the present law for the worse, as they will admit the opportunity for a carrier to take advantage of his own wrong.

#### References

Para. 1. On the background to Article IV (5), see Tetley, at p.434; "Bills of Lading", Report by the Secretariat of UNCTAD, U.N. Document TD/B/C.4/ISL/6/Rev. 1, 1971, at p. 45; and see generally Erling Selvig, Unit Limitation of Carrier's Liability (London, Sir Isaac Pitman and Sons, 1961) and Erling Selvig, "Unit Limitation and Alternative Types of Limitation of Carrier's Liability", in Kurt Gronfors, ed., Six Lectures on the Hague Rules (Goteberg, Akademiforlaget - Gumperts, 1967), at pp. 105-125.

Para. 2. On the problems arising from other uses of gold values see Carver, (12th ed.), at paras. 306-307; Scrutton, (18th ed.), at pp.441 and 449; and Tetley, at pp. 444-447. Problems of forum shopping have developed because of the fixed limit of five hundred dollars, especially between Britain and the United States. The failure of Article IX of the Hague

Rules to indicate at what time the conversion from gold to domestic currency was to be made led countries like Canada to make the conversion when the legislation was adopted. There was no requirement in the Hague Rules to keep the domestic currency equivalent in value to the gold mentioned in Article IX and, therefore, countries have not made adjustments with the results mentioned in the text. Similar comments can be found in T.M.C. Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis" (1974), 5 J. of Maritime L. and Comm. 645, at p.648.

Para. 3. Concerning the use made by shippers of their ability to avoid the limitation of liability provisions, see "Bills of Lading," Report by the Secretariat of UNCTAD, supra para. 1, at p.46. Generally on the shipper's option to avoid liability, see W.E. Astle, Shipping and the Law (London, Fairplay Publications, 1980), at pp.207-210 and John L. DeGurse, Jr., "The 'Container Clause' in Article 4 (5) of the 1968 Protocol to the Hague Rules" (1970), 2 J. of Maritime L. and Comm. 131, at pp. 132-136.

Para. 4. For a discussion of servants, agents and independent contractors, see previous sections entitled Servants of Carriers and Independent Contractors, Chapter 1.A.3 and 4.

Para. 5. The problems of packaging are noted in Scrutton, (18th ed.), at p.442; A. Diamond, "The Hague-Visby Rules" (1978) Lloyd's Maritime and Commercial L.Q. 225, at p. 240; S. Mankabady, "Comments", at pp. 57-58; and see the comments and cases noted in Tetley, at pp. 435-438.

Para. 6. For general comments on "unit", see "Bills of Lading", Report by the Secretariat of UNCTAD, supra para. 1, at p.45; Scrutton, (18th ed.), at pp. 442-443; Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 163-164; and S. Mankabady, "Comments", at p. 58. The first Canadian case mentioned is Anticosti Shipping v. St. Amand (1959), 19 D.L.R. (2d) 472; [1959] S.C.R. 372; [1959] 1 Lloyd's Rep. 359; then Falconbridge Nickel Mines v. Chimo Shipping (1973), 37 D.L.R. (3d) 545; [1973] 2 Lloyd's Rep. 469; [1974] S.C.R. 933, and see also Sept Iles Express v. Clement Tremblay [1964] Ex. C.R. 213 (Ex. Ct.). The first authority referred to is Scrutton, at p. 443. The second authority is Tetley, at pp. 438-441, where he discusses the cases and provides four reasons why the term "unit" in the Hague Rules refers to freight unit.

Para. 7. Comments regarding Article III (3) (b) can be found in Bills of Lading, supra Section A. Concerning Article III (3) (b) and intention, see Tetley, at p. 435. The author referred to in the paragraph with the compromise approach to the definition of unit is Scrutton, (18th ed.), at p. 443. The Canadian courts acceptance of intention is noted in The

Alexander Serafimovich [1976] 1 F.C. 35; [1976] 2 Lloyd's Rep. 346 (Fed. Ct. T.D.).

Para. 8. The Canadian case is Consumers Distributing Co. v. Dart Containerline Co. (1979), 31 N.R. 181 (Fed. Ct. A.D.). Other Canadian cases of note on containers are The Tindefjell [1973] F.C. 1003; [1973] 2 Lloyd's Rep. 253 (Fed. Ct. T.D.) and Quebec Liquor Corp. v. Dart Containerline Co. [1979] 3 A.M.C. 2382 (Fed. Ct. T.D.). The criteria of intention of the parties and the description in the bill of lading is noted in Scrutton, (18th ed.), at pp. 443-444 and Tetley, at pp. 312-314. The American approach is discussed in Tetley, at pp. 314-315 and S. Mankabady, "Comments," at pp. 59-62. The recent U.S. case Mitsui and Co. v. American Export Lines, Inc. [1981] A.M.C. 331 appears to have put to rest the complicated evidentiary problems and list of criteria suggested by the "functional economics test". This case is discussed in Timothy H. Armstrong, "Packaging Trends and Implications in the Container Revolution" (1981), 12 J. of Maritime Law and Commerce 427, at pp. 448-454.

Para. 9. On the damages and losses that may be limited, see "Bills of Lading", Report by the Secretariat of UNCTAD, supra para. 1, at p. 46 and in Selvig, Unit Limitation of Carrier's Liability, supra para. 1, see the chapter entitled "The Different Types of Losses Subject To Limitation", at pp. 81-106. Note should also be made of the previous section on Delay, supra Section F, at paragraph 2 and its accompanying references. Concerning recoverable damages in cargo cases, see Scrutton, (18th ed.), at pp. 397-399 and Tetley, at pp. 129-143. The Canadian case mentioned is Coutinho, Caro and Co. v. The Ermua [1979] 2 F.C. 528 (Fed. Ct. T.D.).

Para. 10. The comments and conclusions in this paragraph are drawn from Tetley, at pp. 25-37; Selvig, Unit Limitation of Carrier's Liability, supra para. 1, at pp. 107-137; and "Bills of Lading", Report by the Secretariat of UNCTAD, supra para. 1, at p. 46. Reference should also be made to Deviation, supra Section E, in particular paragraph 6 and its accompanying reference note.

Para. 11. Carriage of dangerous goods is discussed later in Chapter IV.B. Section 658 of the Canada Shipping Act contains a provision limiting liability for personal baggage and excluding liability for a passenger's gold, silver, diamonds and other like articles of great value, unless a declaration of their value is made. The interrelation of the Rules with other international conventions is discussed supra in How the Rules Apply: Interaction with Other Laws, Chapter II.D.2. The power of the Governor-in-Council that originally existed in s.651 (1) (b) of the Canada Shipping Act was repealed by An Act to amend the Currency and Exchange Act and to amend other Acts in consequence thereof, S.C. 1976-77, c. 38, s. 6(2) and is now



to be found in the Currency and Exchange Act, R.S.C. 1970, c. C-39, s. 13.1. The operative Order in Council is located at SOR/78-73 (1978 II, p. 465).

Para. 12. The general comments in this paragraph are from Tetley, at pp. 441-442 and Scrutton, (18th ed.), at p. 431. The Gold Clause Agreement is set out in its amended version in Tetley, at pp. 563-601. The case is Pyrene Co. v. Scindia Navigation Co. [1954] 2 Q.B. 402, at p. 412.

Para. 14. Material in this paragraph is drawn from S. Mankabady, "Comments", at pp. 112-113; Tetley, at pp. 448-449; and Asser, supra para. 2, at p. 649. The commentator noted is Diamond, supra para. 5, at pp. 237-240. The conversion of gold francs to SDRs is set by Order-in-Council, SOR/78-73 (1978 II, p. 465). Two monetary problems in particular should be noted. First, the existence of a two tier price of gold, one the free market exchange rate and the other the official exchange rate. Secondly, the International Monetary Fund's decision to base the value of the Special Drawing Rights (SDRs) on a basket of currencies rather than gold. These problems, and others, are discussed in the material cited above. And see paragraph 25 infra. The end result is a liability limit that is uncertain, unstable and ineffective. For the amended Gold Clause Agreement see Tetley, at pp. 563-601.

Para. 15. General comments on the alternative limitation scheme can be found in Diamond, supra para. 5, at pp. 240-241; Tetley, at p. 444; Scrutton, (18th ed.), at p. 463; "Bills of Lading", Report by the Secretariat of UNCTAD, supra para. 1, at p. 47; and Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 163-164.

Para. 16. For a detailed discussion on the Hague/Visby Rules container clause and possible increased freight rates, see DeGurse, supra para. 3, and see also Diamond, supra para. 5, at p. 242, fn. 45 and Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at p. 164, fn. 5. In Consumers Distributing Co v. Dart Containerline Co., supra para. 8, the bicycles, although individually packed, were placed in a container for shipment in order to benefit from reduced freight rates.

Para. 17. The Canadian cases noted are Consumers Distributing Co. v. Dart Containerline Co., supra para. 8, and Quebec Liquor Corp. v. Dart Containerline Co., supra para. 8. The cross reference is to Bills of Lading, supra Section A. The authorities referred to are Scrutton, (18th ed.), at p. 463, fn. 37 and Diamond, supra para. 5, at p. 243. Concerning an incorrect enumeration note Scrutton, at p. 463 and Diamond, at p. 243. Other problems with the container clause are noted in

Scrutton, at pp. 463-464 and Diamond, at pp. 242-244, and see also the Second Report of the Secretary-General, UNCITRAL Ybk., Vol. IV, 1973, at pp. 164-165.

Para. 18. On the restriction in Article IV (5) (e) to the carrier, see Diamond, supra para. 5, at pp. 244-245; Scrutton, (18th ed.), at p. 463 and Tetley, at p. 38 and note also the discussion in Exclusion of Liability, supra Section D, on actual fault and privity of the carrier. Concerning the onus of proof on the cargo owner, see Diamond, at pp. 245-246; Tetley, at pp. 37-38; and Scrutton, at pp. 463-464.

Para. 19. The comments in this paragraph are drawn from Tetley, at p. 38; Scrutton, (18th ed.), at p. 464; and Diamond, supra para. 5, at p. 247. On Deviation, see supra Section E, paragraph 6 and the accompanying reference note.

Para. 20. The differing views on Article IV (5) (b) are expressed in Tetley, at p. 144; Scrutton, (18th ed.), at p. 464; and Diamond, supra para. 5, at pp. 247-248. It is the conclusion of Tetley that economic losses are not recoverable under this provision. Concerning Delay, see supra Section F and, in particular, the Third Report of the Secretary-General, UNCITRAL Ybk., Vol. V, 1974, at p. 147. The better view noted here is suggested by Diamond.

Para. 21. For a discussion on Article 7 (2) of the Hamburg Rules, see Servants of Carriers and Independent Contractors, Chapter II.A.3 and 4. Concerning Article 7 (1) of the Hamburg Rules and Article 4 bis (2) of the Hague/Visby Rules, see Diamond, supra para. 5, at pp. 248-249; S. Mankabady, "Comments", at p. 69; D.E. Murray, "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at pp. 66-67; Kurt Gronfors, "Non-contractual Claims Under the Hamburg Rules", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 187-195; and "Bills of Lading - Comments on a Draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping", U.N. Document TD/B/C.4/ISL/19, 30 October 1975, at p. 29. The description of the outcome of these issues is from Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Comm. L.Q. 1, at p. 8.

Para. 22. The dual limitation scheme is noted in J.F. Wilson, "Basic Carrier Liability and the Right of Limitation", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 146-147. Note also the comments in United Nations Conference on the Carriage of Goods by Sea: Official Records U.N. Doc. A/Conf.89/14 (New York, 1981), at pp. 243-249.

Para. 23. On the container provision in the Hamburg Rules and



potential problems, see Murray, supra para. 21, at pp. 86-88 and S. Mankabady, "Comments", at pp. 63-64. The insurance element is noted in J.P. Honour, "The P and I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at p. 245. Article 16 is discussed in Bills of Lading, supra Section A.

Para. 24. Compare the discussion of the Hague Rules in paragraph 3 of this section and see also Wilson, supra para. 22, at p. 148 and Tetley, supra para. 21, at p. 13.

Para. 25. On Special Drawing Rights and the Hamburg Rules generally, see Stephen A. Silard, "Carriage of the SDR by Sea: the Unit of Account of the Hamburg Rules" (1978), 10 J. of Maritime Law and Commerce 13 and Joseph C. Sweeney, "Article 6 of the Hamburg Rules" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 152-155. The Convention on Limitation of Liability for Maritime Claims, 1976 is located in (1977), 16 Int'l Legal Materials 606. See in particular Article 8. A description of the application of Article 26 to non-I.M.F. countries is in Silard, at pp. 32-37. The conclusion that the non-I.M.F. member ends up using the S.D.R. is located in Silard, at p. 15. For a discussion on the real value of SDRs, see Silard, at pp. 27-28. Tetley, supra para. 21, at p. 9 states that gold has more accurately reflected inflation than any other commodity and suggests that SDRs do not properly adjust for world inflation. The date of conversion and the market value of SDRs is more fully discussed in Silard, at pp. 29-32.

Para. 26. The package deal is described in Sweeney, supra para. 25, at pp. 162-164. The comparison of the Hamburg limits to the Hague/Visby limits is in Honour, supra para. 23, at pp. 244-245; M.J. Shah, "The Revision of the Hague Rules on Bills of Lading with the UN System - Key Issues", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at p. 21 and Erling Selvig, "The Hamburg Rules, The Hague Rules and Marine Insurance Practice" (1981), 12 J. of Maritime Law and Commerce 299, at p. 307. The quote is from Tetley, supra para. 21, at p. 9. See also the comments of Sweeney in United Nations Conference on the Carriage of Goods by Sea: Official Records, U.N. Doc. A/Conf.89/14 (New York, 1981), at p. 247.

Para. 28. The material in this paragraph is from the comments of the Canadian and American delegation at the Hamburg Conference, see United Nations Conference on the Carriage of Goods by Sea: Official Records U.N. Doc. A/Conf.89/14 (New York, 1981), at pp. 244-245 and 247, and also Canadian Transport Commission, Unit Values of Commodities Moving in

Canadian Overseas Trade, Research Branch, 20-78-1 (1978), especially the table on p. 18.

Para. 29. The theft scenario is outlined in Murray, supra para. 21, at p. 69. The problem of carriers and servants in Article 8 is discussed in Murray, at pp. 68-70.

Para. 30. The points discussed in this paragraph are noted in S. Mankabady, "Comments", at pp. 73-74; Honour, supra para. 23, at p. 246; and Tetley, supra para. 21, at p. 10. The comparable situation under the Hague Rules is discussed supra at para. 10.



## CHAPTER IV RESPONSIBILITIES OF CARGO OWNERS

### Introduction

The principal obligations of cargo owners are to deliver the goods described in the contract of carriage to the carrier and to pay the freight. Delivery is to the ship's side unless the carrier accepts them on a wharf or some other place ashore. The goods must arrive properly marked and in the correct number, quantity and weight. They must be delivered in a reasonable time before the ship's departure and must be properly packaged for ocean transport. If the goods are of an inflammable, explosive or dangerous nature, the carrier or the master must be informed and his prior consent obtained. Finally the shipper or the consignee must pay the freight agreed, at the time set, by the contract of carriage. Misperformance of any of these activities will incur liability for the cargo owner, unless he can show that the resulting damage was not caused through his fault.

The Rules only impinge on a few of these responsibilities of cargo owners, namely:

- A. Description of Cargo
- B. Dangerous Goods
- C. Exclusion of Liability

A. DESCRIPTION OF CARGO

Hague Rules: Article III (5)

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Carriage of Goods by Water Act: Section 6

Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Hamburg Rules: Article 17

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss relating from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.
2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.



3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this Article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this Article.
4. In the case of intended fraud referred to in paragraph 3 of this Article the carrier is liable, without the benefit of limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

#### Summary

When the shipper furnishes the carrier with particulars of the marks, number, quantity and weight of his goods, he is deemed by the Rules personally to guarantee their accuracy. The guarantee is in return for the issuance of a bill of lading containing those particulars. If the carrier is subsequently held liable for misdelivery to the consignee through an inaccuracy in the information contained in the bill of lading and supplied by the shipper, he has a right to an indemnity from the shipper. Under Canadian law, an exception exists in the event of bulk cargo that is weighed by someone other than the shipper or the carrier.

The widespread practice of shippers giving letters of indemnity to carriers in exchange for clean bills of lading without regard to their accuracy is not regulated by the Hague Rules. Such letters seem to be treated as valid and enforceable in the absence of fraud. The Hamburg Rules

essentially will confirm this opinion of current law.

### Legal Commentary

1. In return for the right to demand a bill of lading when the carrier accepts the goods into his charge, the shipper is held responsible for the accuracy of their marks, number, quantity and weight, but not their condition. Article III (5) of the Hague Rules is evidently intended to express a personal guarantee by the shipper to the carrier. It is not contained in the bill of lading and so, apparently, it is not transferable by operation of the Bills of Lading Acts to consignees and endorsees. Thus for instance, when the consignee complains of short delivery according to misstated information in the bill of lading, he is not infected with the shipper's guarantee. However, the carrier may be estopped from denying the shipment as stated in the bill of lading so that he will be held liable to compensate the consignee. This interpretation of Article III (5) is supported by its last sentence which expressly states that the carrier is in no way limited in his responsibilities to anyone "other than the shipper". The shipper must indemnify the carrier for the loss resulting from inaccuracies in guaranteed particulars, and so will have to reimburse the carrier for the compensation paid to the consignee.

2. The Carriage of Goods by Water Act section 6 makes an exception to the guaranteed accuracy of the stated weight of bulk cargo where it is determined by someone other than the

shipper or the carrier. Provided the bill of lading is so clausued, neither the carrier nor the shipper can be held to its accuracy. "Bulk cargo" within the meaning of section 6 has been held to include coal, grain and oil in bulk but not planks, bagged grain or cargo in cases. Generally, the phrase refers to cargo that is trimmed but not stowed.

3. By contrast, the provisions of the Hamburg Rules relating to guarantees made by the shipper are far more extensive. Article 17 (1) essentially restates the Hague Rules Article III (5), but Article 17 (2) to (4) deal with the difficult issues of letters of indemnity. Quite commonly the carrier issues a clean bill of lading only in return for a letter of indemnity from the shipper for all inaccuracies contained in it. There has always been doubt whether such letters are lawful under the Hague Rules Article III. The practice is very convenient to the trade where there is an honest dispute between the carrier and the shipper, for a clean bill is very important as a document of title. But when a carrier accepts a letter of indemnity in return for a clean bill, he is putting the shipper in a position to commit a fraud on a subsequent holder, such as the consignee. Where the carrier complies with the shipper's wish so as to assist his intended fraud, then certainly the letter, and the contractual arrangement it represents, are unlawful. But conveniencing the shipper, even if the carrier knows of an inaccuracy in the particulars in the bill, falls short of the Common Law concept of fraud. The practical problem centres on the uncertainty as

to what discrepancies between the particulars furnished and the goods received really need to be noted on the bill of lading.

4. This is the context in which Articles 17 (2) to (4) will have to operate. They were the subject of considerable disagreement during the preparation of the Hamburg Rules. There was a choice of three solutions: i) to approve all letters of indemnity, ii) to prohibit all letters as invalid; or iii) to permit letters but to regulate their consequences. The third course was chosen. Article 17 (2) states the obvious, that the contractual undertakings of the letter of guarantee will not affect third parties. Thus a consignee may still rely upon the bill of lading and may still recover from the carrier for misdelivery according to its tenor. The carrier will be able to demand indemnity from the shipper both by operation of Article 17 (1) and under the letter of guarantee. However, if the carrier acts fraudulently, he will lose his right to indemnity from the shipper by Article 17 (3) and he will be liable, without the benefit of limitation to the consignee by Article 17 (4). During the negotiations leading to the Convention, it was argued that: i) these provisions would have the effect of forcing carriers always to enter a reservation on bills of lading where there was uncertainty as to the validity of letter of guarantee; ii) it is the shipper rather than the carrier who usually benefits from the issuance of a clean bill of lading; iii) it was, therefore, unjust that the carrier be held liable to the consignee in such cases; and iv) it was doubtful that it was even in the proper purview of

the Convention to deal with letters of guarantee. The Canadian delegation expressed the opinion that the convention should not deal with letters of guarantee as it would have the effect of misleading subsequent holders of the bill of lading. The Hamburg Rules will affirmatively settle the issue whether letters of indemnity may be used, but they achieve little more than a codification of the Common Law as to the effect of such letters. The consignee will be able to break the carrier's limitation of liability when he can prove fraud, but that is extremely difficult to do. Most of the problems over letters of guarantee will persist.

#### References

Para. 1. The purpose of the Article is noted in Fourth Report of the Secretary-General, UNCITRAL Ybk., Vol. VI, 1975, at pp. 216-218. Its relation to the Bills of Lading Acts is discussed by Carver, (12th. ed.) at para. 273. The operation of these Acts is explained in this report in Cargo Owners, Chapter I.A.2, and Bills of Lading, Chapter III.A, at paragraph 8.

Para. 2. Section 6 is also discussed under Responsibilities of the Carrier: Bills of Lading, Chapter III.A, at paragraph 10. The description of bulk cargo is from Carver, (12th ed.), at para. 249.

Para. 3. Tetley discusses the practice and problems of letters of indemnity at pp. 401-407. See also S. Mankabady, "Comments", at p. 89.

Para. 4. The choice of solutions was presented by the American delegation. See S. Mankabady, "Comments", at p. 90. The arguments are recorded in "Report of the Secretary-General: Analysis of Comments by Governments and International Organization on the Draft Convention on the Carriage of Goods by Sea", UNCITRAL Ybk., Vol. VII, 1976, at p. 291 and are discussed by C.W.H. Goldie, "Documentation - The Writing on the Bill: Articles 15-18 of the Hamburg Rules", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston, Sijthoff and Leyden, 1978), at pp. 216-217.



B. DANGEROUS GOODS

Hague Rules: Article IV (6)

Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Carriage of Goods by Water Act: Section 7 (1)

Nothing in this Act affects the operation of sections 450 and 451 and the sections of 647 to 658 of the Canada Shipping Act, or the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

Hamburg Rules: Article 13

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.
2. Where the shipper hands over dangerous goods to the carrier or the actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:
  - a. the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and
  - b. the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
3. The provisions of paragraph 2 of this Article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this Article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of Article 5.

#### Article 15 (1) (a)

1. The bill of lading must include, inter alia, the following particulars:
  - (a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

#### Summary

The cargo owner may not ship dangerous goods without informing the carrier of their dangerous character at least as known to him. He will be liable for all resulting damage if he does so, and the carrier may dispose of the cargo without compensating him. But where the carrier accepts the goods, in the knowledge of their dangerous character, he is bound to take appropriate care of them. Goods may be dangerous in themselves, such as explosives, or because they may cause physical danger to the ship as a consequence of sea carriage, or because they put the ship at risk of legal restraint. These principles of the Common Law and of the Hague Rules are bolstered by the Canada Shipping Act and the Dangerous Goods Regulations made under it. They subject the shipper and the carrier to many detailed requirements about notification and

handling of prescribed kinds of cargo.

The Hamburg Rules adopt the principles of the Hague Rules and add further requirements for notification which will be consistent with the Canada Shipping Act. They confirm the liability of the shipper, and the carrier's power to dispose of the goods, if the dangerous character of the cargo is not notified. But where the carrier accepts the goods knowing of their dangerous character, he may become liable for their loss in disposing of them and the shipper will not be responsible for the damage they may cause.

#### Legal Commentary

1. Section 7 of the Carriage of Goods by Water Act, makes clear that sections 450 and 451 of the Canada Shipping Act apply when goods are carried under the Hague Rules. Section 450 (3) places an obligation on shippers to mark distinctly any dangerous goods in accordance with the Dangerous Goods Shipping Regulations. Moreover, the shipper is obliged under the same section to give written notice of the nature of the dangerous goods and the name and address of their sender to the carrier or his agents. If the shipper fails to give such notice, he is subject to a fine or imprisonment or both.

2. At Common Law, there also exists an implied duty upon the shipper not to send dangerous goods via a common carrier without first informing the carrier of their dangerous nature. Hence,

"where a man calls upon a common carrier to carry general cargo, thus relying simply upon the common law duty of the carrier so to do, and without informing the carrier of the nature of those goods so as to enable him to judge of their fitness, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against damages arising from the fact that the goods are not such that he had the right thus to call upon the common carrier to carry".

Nevertheless, if the carrier accepts the goods and ought to have known of their dangerous character, then the shipper will not be held liable for the damage caused by the goods. Finally, the shipper's implied undertaking is probably not an absolute guarantee of the goods' harmlessness. It is only a guarantee that, to the shipper's knowledge, the goods are not dangerous and that he has taken reasonable care to establish that fact.

3. Goods may be physically dangerous in themselves, such as explosives and corrosive liquids, or they may be dangerous as cargo because of the inevitable impact of sea carriage upon them. For instance, in one Canadian case a cargo of copper concentrate shifted in the holds causing the ship to list hazardously. The shifting, brought on by the continual buffeting of the ship by wind and waves, was only possible because of the wetness of the cargo. The shipper was held responsible to the carrier for shipping dangerous goods. The Common Law rule about physically dangerous goods also extends to cargoes which render the voyage illegal, or which may place the ship in a position of forfeiture or delay.

4. The Common Law position has not been materially altered by the Hague Rules Article IV (6). The Article does not state that the shipper must convey to the carrier the dangerous nature of the goods. However, if the carrier does not know of their dangerous character, the shipper will be held liable for all damages and expenses directly or indirectly arising out of their shipment. This language seems to imply that the shipper's responsibility for dangerous goods under the Hague Rules is virtually absolute. Moreover, the carrier or master may unload, destroy or jettison the dangerous cargo without compensating its owner.

5. The Hamburg Rules Article 13 follow the principles of the Hague Rules but additionally elaborate the shipper's duties of notification. Article 13 (1) will order the shipper to mark and label the dangerous goods themselves. Article 15 (1) (a) will require the bill of lading to contain an express statement of the dangerous character of the goods. By Article 13 (2) the shipper will also have to inform the carrier of any precautions to be taken with regard to the dangerous cargo. Even so, these requirements are nowhere as detailed as the Canada Shipping Act and its regulations and will not be inconsistent with them.

6. As under the Hague Rules, Article 13 will make the shipper liable to the carrier for any loss resulting from the shipment of dangerous goods if he fails to inform the shipowner of their character. However, where the carrier has been informed of the dangerous nature of the goods and nevertheless



accepts them, Article 13 (3) expressly states that the shipper will not be held liable for any loss occasioned by them. This Article essentially codifies the practice under the Hague Rules. The carrier will continue to have a right to unload, destroy or jettison dangerous cargo but only "as the circumstances may require." Moreover, Article 13 (4) points out that, though this power may be exercised whenever the goods are dangerous, if the carrier has accepted them for carriage knowing of their character, his conduct will be judged according to the general standard of responsibility established in Article 5 and he may, as a result, be liable to compensate their owner.

#### References

Para. 1. The Dangerous Goods regulations may be found in C.R.C. 1978, c. 1419, at p. 11537. Both the shipper and the carrier are usually subject also to the IMCO Code on Dangerous Goods.

Para. 2. The leading Common Law authorities are Bamfield v. Goole and Sheffield Transport Co., [1910] 2 K.B. 94, from which the quote is drawn at p. 108, and Brass v. Martland (1856), 6 E. and B. 470. See Payne and Ivamy's Carriage of Goods by Sea (11th ed.) (London, Butterworth's, 1979), at p. 92 and compare Carver, (12th. ed), paras. 689 and 690.

Para. 3. The Canadian case is Heath Steele Mines Ltd. v. The Erwin Schroder, [1969] 1 Lloyd's Rep. 370, aff'd [1970] Ex. C.R. 426. This case also confirmed for Canada the Common Law principle expressed in Brass v. Martland, supra para. 2. Bulk cargoes of ore concentrates are now subject to detailed codes of prescribed handling. The leading case on cargoes that are dangerous impediments to the ship is Mitchell, Cotts v. Steel, [1916] 2 K.B. 610, which is discussed by Carver, (12th ed.), at para. 694.

Para. 6. Article 5 is discussed in Exclusion of Liability, supra Chapter III.D. Even if the carrier knows the nature of the goods there will still be a question of the knowledge that may reasonably be expected of him about the proper way to handle them. See The Mahia [1955] 1 Lloyd's Rep. 264 (Que. S.C.) and S. Mankabady, "Comments", at pp. 81-82.

## C. EXCLUSION OF LIABILITY

### Hague Rules: Article IV (3)

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

### Hamburg Rules: Article 12

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

### Summary

The cargo owner is excused by the Hague Rules from liability for loss to ship or shipowner caused without his or his employees' fault or neglect. The Hamburg Rules also extend the protection to the employees personally.

### Legal Commentary

1. Whenever the Hague Rules apply to a contract of carriage, the shipper will be exonerated by Article IV (3) from liability for the carrier's losses if he can prove that neither he nor his servants and agents were neglectful or otherwise at fault. Since the Rules are mandatory, the shipper cannot be persuaded to contract out of this protection. It has been suggested that Article IV (3) might relieve the shipper from liability in respect of his warranty that his goods are not dangerous. However, it has been pointed out to the contrary

that the general policy of the Hague Rules is such that a shipper would probably be held liable for the damage caused by his goods, regardless whether he in fact knew of their dangerous character.

2. By virtue of the Bills of Lading Acts, "shipper" within Article IV (3) has been construed to include "any consignee of goods named in the bill of lading or any endorsee thereof to whom the property in the goods shall pass."

3. In the making of the Hamburg Convention a good deal of debate surrounded the question whether it was necessary to include an article outlining the liability of the shipper. It was eventually decided that Article 12 should be included in order to clarify that the carrier will not be liable for losses arising from: i) an act or omission of the shipper or owner of the goods, his agent or representative; ii) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods; iii) insufficiency of packing; and iv) insufficiency or inadequacy of marks. However, the language of Article 12 does not depart significantly from the Hague Rules Article IV (3). The protection is expressly extended to servants and agents in their personal capacities.

#### References

Para. 1. Only the carrier may surrender his rights. See Article V, para. 1, discussed under How the Rules Apply, supra Chapter II.D.1. The interaction of Article IV (3) with the shipper's responsibilities for dangerous goods is discussed in Carver, (12th ed.), at para. 293. See also the preceding Section B at paras.2 and 4.

Para. 2. The point is made in Scrutton (18th ed.) at p. 438.

Para. 3. The reasons for Article 12 are referred to by S. Mankabady, "Comments", at p. 78.

## CHAPTER V CLAIMS AND ACTIONS

### Introduction

A right to redress for breach of the 'carriage contract or of the Rules is no good without remedial procedures. The Rules contribute their own special standards to the ordinary procedures of national courts, where disputes will be heard. They deal with five matters: 1) the time limits on giving notice of loss; and 2) on bringing suit in court; 3) access to the courts; or 4) to arbitration; and 5) the regime of general average.

These subjects are discussed in the following sections:

- A. Notice of Loss
- B. Limitations of Actions
- C. Jurisdiction
- D. Arbitration
- E. General Average



A. NOTICE OF LOSS

Hague Rules: Article III (6) para. 1,2,4

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

Hamburg Rules: Article 19

1. Unless notice of loss or damage, specifying the general nature of such is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.
2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this Article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.
3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.
4. In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.
6. If the goods have been delivered by an actual carrier, any notice given under this Article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.
7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is prima facie evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.
8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

### Summary

Prompt written notice of loss is required of claimants under the Hague Rules to prevent a prima facie inference that no damage has occurred. The cargo owner must give notice of apparent damage to his goods at discharge, and of concealed injury within three days of unloading. The time limits will be relaxed under the Hamburg Rules to one and fifteen days respectively. They also add a new rule that the carrier will have to give notice of his damage to the shipper within ninety days after delivery or after injury to his ship or other cargo, whichever is the later.

## Legal Commentary

1. These portions of Article III (6) reinforce the general principle within the Hague Rules that the cargo owner has the burden of proving loss or damage. The first paragraph is intended to ensure that written notice of loss is given before the burden of disproving damage falls on the carrier. Thus, unless the consignee gives written notice at the port of discharge that the goods did not arrive in the condition stated within the bill of lading, he will have to discharge a much heavier burden of proof. The provision also seems to require that the consignee be present when the goods are discharged and inspected. Otherwise, when a ship, which has no agent in port, discharges her cargo and sails before the consignee has inspected his goods, he will not be able to give notice to the carrier. The practical effect of this paragraph in the event of a dispute is that the court may be reluctant to accept the consignee's claim for alleged damage to his goods if he did not give the required notice to the carrier. Moreover, the notice requirement serves to inform the carrier of the evidence which he will need to preserve in order to refute the cargo owner's claim.

2. Paragraphs 2 and 4 ease the responsibilities of notice and proof by encouraging access to the evidence of damage for both parties, preferably by joint survey, in which case notice is dispensed with. Article III (6), however, does not indicate the procedure the consignee should follow if there

are no goods available by reason of their total loss.

3. The Hamburg Rules Article 19 are not substantially different in principle although they add one new rule for the benefit of cargo owners. Generally their time requirements for notice are somewhat relaxed. The consignee will be given one working day in which to give written notice to the carrier or actual carrier that his goods have been damaged. Where there is hidden damage to the goods, the consignee will have fifteen, instead of just three, consecutive days in which to give his written notice. Paragraphs 3 and 4 reiterate the Hague Rules. Paragraph 5 will introduce a separate, sixty day time limit on claims for loss from delay.

4. Article 19 (7) will introduce a new rule to place a complementary time limit and evidentiary burden on the carrier for claims against the cargo owner. The carrier's failure to give written notice of his loss to the shipper within ninety days after the damage or after delivery, whichever is later, will constitute prima facie evidence that the shipper is not responsible for it. The provision relates to the shipper's responsibilities for dangerous goods or other faults which might cause damage to other cargo or to the carrier's vessel.

#### References

Para. 1. The analysis is from Carver, (12th ed.), at para. 274 and Scrutton, (18th ed.), at p. 428. The practical implication is made in "Report of the Working Group (Eight Session)", UNCITRAL Ybk., Vol. VI, 1975, at p. 227.

Para. 2. The omission is noted by Scrutton, (18th ed.), at p.

428.

Para. 3. The Hamburg Rules are described in S. Mankabady, "Comments", at pp. 93-94. The time limit on claims for delay is discussed under Delay, Chapter III.F.

Para. 4. Paragraph 7 is the subject of comment by J.A. Maher and J.D. Maher, "Marine Transport Cargo Risks and the Hamburg Rules" (1980), 84 Dickinson L. Rev. 183, at p. 216.



## B. LIMITATION OF ACTIONS

### Hague Rules: Article III (6) para. 3

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

### Hague/Visby Rules: Article III (6) para. 3

Subject to paragraph 6 bis, the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

### Article III (6) bis

Action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person beginning such action for indemnity has settled the claim or has been served with process in the action against himself.

### Hamburg Rules: Article 20

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.
2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.
3. The day on which the limitation period commences is not included in the period.
4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

### Summary

In the event of loss, a claim must be brought within a fixed period or it will be time barred. Under the Hague Rules the time limit is one year but this has proved too onerous. Through the so-called Gold Clause Agreement sponsored by the British Maritime Law Association, many carriers and insurers have agreed to extend the period to two years. The Hague/Visby Rules confirm the power to extend the time limit by such an agreement and to bring indemnity actions after the time limit for the damage suit. The Hamburg Rules will adopt the two year rule, will protect indemnity actions, and will provide greater precision in the method of calculating the time elapsed.

### Legal Commentary

1. The Hague Rules set a short, strict time limit in which to bring suit. By Article III (6) paragraph 3, unless the cargo owner issues a writ against the carrier within a year, or the carrier waives that requirement, he will lose any remedy which he might have had for his losses. The term "suit" within the paragraph has been held to be sufficiently broad to include arbitration.

2. In the Hague/Visby Rules, "all liability whatsoever" replaces "all liability in respect of loss or damage". This alteration makes the one year time bar applicable to cases where the carrier commits a deviation or has misdelivered the goods. It has also been suggested that the alteration was made with intent to "make the time limit apply where the goods had been delivered without production of bills of lading and so to make it unnecessary to require an indemnity given by the receiver to be kept open definitely".

3. The purpose of the time bar is to speed up the settlement of claims and to prevent carriers from imposing unduly short time limits upon cargo owners. However, in practice one year has proved onerous to carriers and cargo owners alike. As a consequence, agreements to extend the time are common and do not appear to be invalid. Frequently clause 4 of the Gold Clause Agreement promoted by the British Maritime Law Association will operate. In its revised version after the Hague/Visby Rules, this clause states that the time for suit is two years provided notice of loss or damage is lodged within one year.

4. Where the carrier is sued, he may wish to interplead another defendant or to claim in a separate action for an indemnity. It would seem that the carrier is not time barred by the Hague Rules as his action is not for breach of the carriage contract to which they apply. Thus the ordinary period of limitation of the court's rules operates. The Hague/Visby Rules will add Article III (6) bis to confirm this

conclusion and to assure that in all situations a minimum of three months after the initial suit is settled or served will be allowed for commencement of indemnity actions. One occasion for its application will be when the carrier under one bill of lading is also the shipper or consignee under another bill of lading.

5. The Hamburg Rules are a good deal more specific on this touchy subject, and, importantly, they will enlarge the limitation period from one year to two. They will apply to all actions relating to the carriage whether brought by the shipper or the carrier, in contract or in tort. The only exception is general average claims. The inclusion of arbitration is specifically confirmed, thus countering American jurisprudence to the contrary. The validity of agreements to extend the limitation period is also confirmed by paragraph 4. The Hamburg Rules adopt the provision of the Hague/Visby Rules about indemnity claims with greater specificity and provide a useful clarification of when the limitation period will begin to run. Disputes about how to count the time that arise under the Hague Rules will be dissolved by the certainty provided by the Hamburg Rules Article 20 (2) and (3).

### References

Para. 1. The case on "suit" is The Merak [1965] P. 223. See Carver, (12th ed.) at para. 274A. Tetley discusses delay for suit at pp.331-347.

Para. 2. The analysis is from Scrutton, (18th ed.), at p. 460. The suggestion was made in A. Diamond, "The Hague-Visby

Rules" (1978) 2 Lloyd's Maritime and Commercial Law Quarterly 225, at p. 256.

Para. 3. The commentary is drawn from Tetley, at pp. 331 and 339. The revised Gold Clause Agreement is reprinted in Tetley, at p. 563.

Para. 4. Tetley discusses the time bars on a variety of cross actions at pp. 338-339. The application is mentioned in Scrutton, (18th ed.), at p. 461.

Para. 5. The Rules will apply to all kinds of actions by virtue of Article 7 (1) discussed in Limitation of Liability, Chapter III.G, at paragraph 21. General Average is an exception by virtue of Article 24 (2) which is discussed infra, Section E. See S. Mankabady, "Comments", at pp. 96-97. D.E. Murray points out the importance of the arbitration issue to the United States in "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at p. 80.



C. JURISDICTION

Hamburg Rules: Article 21

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
  - (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
  - (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
  - (c) the port of loading or the port of discharge; or
  - (d) any additional place designated for that purpose in the contract of carriage by sea.
2. (a) Notwithstanding the preceding provisions of this Article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this Article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.
  - (b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.
3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this Article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.
4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this Article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before the

first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this Article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this Article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this Article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

### Summary

A claimant may bring an action for his loss in the court of any place that considers it has sufficient connection with the carriage or the parties to take jurisdiction. The Hague Rules do not regulate the choice of court or forum. Bills of lading commonly include a clause pre-selecting a jurisdiction to the convenience of the carrier. The power to insert such clauses is now recognized in Canada, though not in all other countries but, even so, Canadian courts may not always enforce them. The cost of litigation in a distant court may be prohibitive for a cargo claimant. If he brings suit locally, jurisdictional disputes and forum shopping will wastefully ensue. The Hamburg Rules will make great progress in the reduction of these two associated problems. Jurisdiction clauses in bills of lading will be permitted, but the claimant will have five other designated choices of jurisdiction. Other places and multiple suits will be prohibited.

## Legal Commentary

1. Bills of lading frequently include a clause that directs a claimant to bring suit in a particular jurisdiction. Carriers are wont to do so for their own convenience and to take advantage of local variations in the Rules. As a result a great deal of wasteful forum shopping can ensue. However, the Hague Rules provide no solution to the problem. At present, it has to be resolved by the court seized of the action according to its own private international, alias conflicts of, law. The Government of Canada has summarized the position in Canadian law thus:

"The courts in Canada have held on various occasions that they have discretion to decide whether or not they should honour jurisdiction clauses incorporated into bills of lading. This discretion will be exercised upon proof of facts concerning the country of the ship's flag, the domiciles of the shipowner, the shipper and the consignee, the countries from where and to where the shipment was being carried, the place and circumstances under which the shipment was damaged and from where the witnesses will have to be brought to trial; in other words, in what jurisdiction, be it in the country where the action was instituted or the country mentioned in the jurisdiction clause would it be most convenient and inexpensive to the parties to have the case heard."

In other countries jurisdiction clauses may be treated quite differently.

2. The Hamburg Rules represent the first attempt at fixing a limited number of competent jurisdictions. Even so, by Article 21 (1) and (2), the claimant will have six options:

i) the defendant's place of business, ii) the place where the contract is concluded; iii) the port of loading; iv) the port of discharge; v) the place stipulated in the contract; or vi) the place where the vessel is arrested. Thus, while the Hamburg Rules will permit the use of jurisdiction clauses, they will not oust the claimant's right to sue somewhere else more convenient to him. For instance a Canadian consignee could sue in Canada at the port of discharge notwithstanding a jurisdiction clause naming London, or some even more distant place. The defendant, typically the carrier, will not be able to resist the claimant's choice of jurisdiction except in the event of arrest. Then, by Article 21 (2), the defendant will be able to request the claimant to select one of the other choices of jurisdiction, provided he puts up sufficient security to compensate the claimant. It has been suggested, however, that this paragraph will cause more problems than it will solve. Once the choice has been made and an action instituted, Article 21 (4) will, suitably, prevent any other suits in other places.

3. Without doubt the provisions of the Hamburg Rules provide a major advance over the unregulated jostle for jurisdiction that the Hague Rules allow. The jurisdiction and conflicts of laws provisions of Article 21 create an appropriate set of rules of benefit to both shippers and carriers, for they much reduce the number of courts to which parties must resort in order to satisfy their claims. However, the Hamburg Rules fail to deal with two other related and still

unregulated matters, the choice of applicable law and the recognition of judgements.

### References

Para. 1. Tetley discusses the international treatment of jurisdiction clauses at pp. 389-399, and mentions the Canadian cases at p. 399. The summary of Canadian law was reprinted in First Report of the Secretary-General, UNCITRAL Ybk., Vol. III, 1972, at p. 278. S. Mankabady considers the validity of jurisdiction clauses in Britain, United States, France and Belgium in "Comments", at pp. 99-103.

Para. 2. The variety of viewpoints on jurisdiction before Article 21 was adopted are outlined in S. Mankabady, "Comments", at pp. 103-104. It is also his suggestion about Article 21 (2) at p. 105. But compare D.C. Jackson, "The Hamburg Rules and Conflicts of Laws", in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods By Sea (Boston, Sijthoff and Leyden, 1978), at pp. 234-235.

Para. 3. The conclusions reflect the opinion of Tetley, "The Hamburg Rules - A Commentary" (1979) Lloyd's Maritime and Commercial Law Quarterly 1, at p. 8; D. E. Murray, "The Hamburg Rules: A Comparative Analysis" (1980) 12 Lawyer of the Americas 59, at pp. 81-82; and D.C. Jackson supra, para. 2.



D. ARBITRATION

Hamburg Rules: Article 22

1. Subject to the provisions of this Article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.
2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provisions shall be binding upon the holder of the bill of lading, the carrier may not invoke such provisions as against a holder having acquired the bill of lading in good faith.
3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
  - (a) a place in a State within whose territory is situated:
    - i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
    - ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
    - iii) the port of loading or the port of discharge; or
  - (b) any place designated for that purpose in the arbitration clause or agreement.
4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.
5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
6. Nothing in this Article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

## Summary

Arbitration is an adjudication according to law by a private tribunal in place of the public court. It is outside the purview of the Hague Rules, although many bills of lading include an arbitration clause, the effect of which is to choose the form and place of adjudication for a dispute over the carriage contract in advance. As such, jurisdiction and arbitration clauses are interrelated and subject to the same kinds of problems. The Hamburg Rules will make generous provision for the regulated use of arbitration clauses in a similar way to jurisdiction clauses, thus encouraging uniformity in their practice.

## Legal Commentary

1. Arbitration is a form of procedure. It is ignored by the Hague Rules as they deal with substantive obligations of the carriage contract. Nevertheless many carriage contracts include arbitration clauses which pre-select the form of adjudication in the event of a dispute. In this sense, arbitration and jurisdiction clauses are alike in setting the forum. As a result, arbitration clauses run into all the problems and uncertainties that jurisdiction clauses create in the courts. Local law has a controlling influence on judicial jurisdiction, the arbitral tribunal, and the applicable law which cannot be escaped in the event of dispute about the arbitration clause itself.

2. Article 22 of the Hamburg Rules sets about the task of providing uniform rules for the fair use of arbitration clauses. Paragraph (1) does not merely acknowledge the prevalence of their use, but expressly 'will permit the practice. However, paragraph 3 sets down a mandatory selection of arbitral sites which are substantially the same as for curial jurisdiction under Article 21, less the place of arrest. Hence uniformity in the Rules is preserved. Once again, the carriage contract may name the place of arbitration, but the claimant may choose one of the other locations more convenient to him. Paragraph 5 prevents him from selecting a place not listed in paragraph 3, unless, by virtue of paragraph 6, the defendant agrees with him. By a combination of paragraphs 4 and 5, an arbitration clause is deemed to incorporate the Hamburg Rules as the law to be applied. A frequent source of dispute surrounding an arbitration clause is the assertion by the carrier that it is incorporated in the bill of lading by reference to the charterparty. This nice question continues to trouble the courts, who are called upon to make fine distinctions among general words of reference. Article 22 (2) makes clear that in future an arbitration clause in a charterparty will not affect a claimant, other than the charterer, under a bill of lading unless there is "a special annotation providing that such provision shall be binding" in the bill itself. In sum, the Hamburg Rules will make a generous attempt at ordered use of arbitration in carriage disputes.

## References

Para. 1. The relation of jurisdiction and arbitration is noted in D.C. Jackson, "The Hamburg Rules and Conflicts of Law," in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods By Sea (Boston, Sijthoff and Leyden, 1978) 221, at p. 230, and in Tetley, at p. 295.

Para. 2. See D. E. Murray, "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59, at p. 82; J.A. Maher and J.D. Maher, "Marine Transport Cargo Risks and the Hamburg Rules" (1980), 84 Dickinson L. R. 183, at pp. 216-217, and Tetley, "The Hamburg Rules: A Commentary" (1979) Lloyd's Maritime Commercial and Law Quarterly 1, at p.8. The problem of incorporation is discussed by S. Mankabady, "Comments", at pp. 106-110; by Tetley, at pp. 297-298; and by Scrutton, (18th ed.), at p. 66.

## E. GENERAL AVERAGE

### Hague Rules: Article V para. 2

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

### Hamburg Rules: Article 24

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.
2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

### Summary

General average is an ancient maritime principle. It covers loss incurred by sacrifice or expense made to preserve the rest of the ship and cargo during danger in the voyage. It requires a proportionate contribution to the injured party from the others interested in the voyage. The Rules do not govern general average, but they permit provision to be made for it in the carriage contract. Frequently, the York-Antwerp Rules are incorporated.

General average cannot operate so as to relieve the carrier of his responsibilities under the Hague or Hamburg Rules. In particular, he cannot recover a contribution for a loss if the general average acts were rendered necessary



through his fault. The meaning of fault in this context differs in national law. The Hamburg Rules will render uniform the trial of fault by reference to the carrier's liability exclusively under the Rules.

### Legal Commentary

1. "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested." A contribution in general average is the sharing of the group loss. The Hague Rules permit lawful provision for general average to be made in the bill of lading, but do not otherwise regulate the matter. A provision would be unlawful if contrary to the Rules, such as relieving the carrier of liability, but it has also been interpreted to mean lawful apart from the Carriage of Goods by Water Act.

2. The applicable principles of general average loss and contribution are to be found either in local law or in the contract of carriage. Quite commonly the York-Antwerp Rules on general average are incorporated by specific reference in the bill of lading. These rules do not have statutory force but the courts have recognized them and applied them as terms of the carriage agreement. One important principle is that a party cannot claim a contribution in general average if the general average loss was caused through his fault. The courts

have struggled with the meaning of fault in this context. The leading British case decided that the fault must be actionable at law to upset the right to a contribution. The law broken may, it seems, be the Hague Rules themselves or any other principle of Common Law or statute. A different decision has been reached in the United States where the fault of the defendant, even though he is exculpated by an excepted peril, is enough to defeat his right to a contribution. The confusion is at present resolved only by careful drafting of the bill of lading.

3. The Hamburg Rules Article 24 (1) will continue to permit the carriage contract to provide for events of general average. Thus the York-Antwerp Rules will still be open for incorporation. The phrase "lawful provision" is omitted but the Rules cannot be presumed to allow unlawfulness. Like the Hague Rules, Article 24 does not regulate general average except in one respect. Apart from the time bar contained in Article 20, the provisions of the Hamburg Rules on liability of the carrier will govern whether he may claim a contribution in general average. The effect of Article 24 (2) will be to make the right to a contribution more dependant on fault as it is understood in the Hamburg Rules. There may be doubt whether the Article refers to all the principles of liability, including limitation, but it will encourage greater uniformity over general average as questions of fault will no longer have to be determined by resort to national law outside the Rules.

## References

Para. 1. The quote is from Birkley v. Presgrave (1801), 1 East 220, at 228. This definition of general average is discussed by Carver, (12th ed.), at paras. 849 and 850. "Lawful provision" is interpreted thus by Scrutton, (18th ed.), at p. 446.

Para. 2. The Supreme Court of Canada has applied the York-Antwerp Rules in, for instance, The Oakhill, [1974] S.C.R. 1225. The leading case in Britain is Dreyfus v. Tempus Shipping Co., [1931] A.C. 726, and in the United States is The Trawaddy (1897), 171 U.S. 187. Carver, (12th ed.), discusses these decisions in the context of "fault" at paras. 866-875.

Para. 3. Article 20 is discussed under Limitations of Actions, supra Section B. Some of the comments on Article 24 reflect the Report of the Working Group (Eighth Session), UNCITRAL Ybk., Vol. VI, 1975, at p. 230, and Tetley, "The Hamburg Rules - A Commentary" (1978) Lloyd's Maritime and Commercial L.Q. 1, at p. 12.

CHAPTER VI    GENERAL OVERVIEW OF COMMERCIAL IMPACTS OF    ADOPTING  
THE HAGUE/VISBY OR THE HAMBURG RULES

A key consideration in adoption of either the Hamburg Rules or the Hague/Visby Rules by Canada will be their commercial impact for shippers and shipowners. However, a detailed analysis of these impacts is dependent on the availability of adequate information on the international movement of commodities and the costs of their marine carriage under the existing law as any change in legislation will affect the allocation of these costs. Much of this necessary information is either not in the public domain, or, if it is, is not provided in a format conducive to analysis. For example, figures on international seaborne trade by detailed commodity classification are not recorded in tonnage but in dollar terms.<sup>1</sup> The lack of information in a usable format also prevents a definitive evaluation of the impact of adopting either the Hamburg or the Hauge/Visby Rules.

Therefore, only a general overview of the likely impacts on Canadian commerce is planned, according to the terms of reference, and the incremental benefits that might be afforded by adoption is assessed for both Canadian cargo owners and shipowners. For the purpose of identifying these incremental benefits, a summary table (Exhibit 1) has been prepared to introduce those legal changes of potential commercial significance. The discussion following will attempt to illustrate and evaluate the significance of each of these legal

changes. However, before this can be done, the patterns of Canadian international trade must be understood.

# EXHIBIT 1

## Legal Changes of Commercial Significance

Item		Cross-Reference
<hr/>		
1.	Extended Application of the Hamburg Rules:	
	(i) To All Contracts of International Carriage, Except Charterparties	II.B.2
	(ii) To Export and Import Traffic	II.B.3
	(ii) Reduction of Forum Shopping	V.C,D.
2.	Extended Scope of the Hamburg Rules:	
	(i) Live Animals	II.C.2
	(ii) Deck Cargo	II.C.1
	(iii) Packaging	II.C.3
	(iv) Period of Responsibility (?)	II.B.4
	(v) Transshipment	II.B.5
	(vi) Acts of Independent Contractors (?)	II.A.3,4
3.	Increased Documentation	III.A
4.	Likelihood of Litigation and Burdens of Proof:	
	(i) Changed Terminology	
	(ii) Relaxed Time Limits	V.A,B
	(iii) Clarification of Burdens of Proof	
	(a) Identity of Responsible Carrier	II.A.1, B.5
	(b) Seaworthiness	III.B
	(c) Care of Cargo	III.C
	(d) Fire	III.D
5.	Increase in Degree of Responsibility for Care of Cargo:	
	(i) Seaworthiness	III.B
	(ii) Excepted Perils	III.D
6.	Increased Limits of Liability:	
	(i) Package or Unit	III.G
	(ii) Containerized Goods	III.G
	(iii) Containers	III.G
	(iv) Limitation by Weight	III.G
	(v) Monetary limits	III.G
	(vi) Claims for Delay	III.F
	(vii) Fundamental Breach of Carriage	III.G



# A. CANADA'S INTERNATIONAL TRADE

Canada is a major contributor to world seaborne trade, as illustrated in Table 1. Shipping statistics for 1975 show that Canada exported roughly four tenths as much trade by sea as the United States, given only one tenth of the population. Of interest in any commercial assessment of changing carriage legislation is an evaluation of: (1) Canada's major partners in seaborne trade, and (2) the nature of this trade.

TABLE 1  
WORLD SEABORNE TRADE  
(in million metric tons)

		LOADED			UNLOADED		
		TOTAL	TANKER	DRY CARGO	TOTAL	TANKER	DRY CARGO
WORLD	-1974	3317	1808	1509	3256	1793	1463
	-1975	3175	1742	1433	3081	1640	1441
CANADA	-1974(1)	106	7	99	61	22	39
	-1975(1)	102	6	96	64	23	41
U.K.	-1974	54	16	38	214	128	86
	-1975	51	14	37	117	102	75
U.S.	-1974	246	2	244	425	270	155
	-1975	246	-	246	409	245	164

NOTES: (1) Includes Canadian-U.S. Great Lakes and St. Lawrence Seaway traffic of 36 million metric tons in 1974. Note the definitive export-import imbalance in cargo tonnage.

SOURCE: Maritime Transport, 1976, O.E.C.D., p. 25.

TABLE 2

DESTINATIONS OF CANADIAN EXPORTS 1980  
(in billions \$Cdn.)

Export Destinations	Value	By Water
U.S. (1)	48.1	2.6
Japan	4.4	4.0
U.K.	3.2	2.6
West Germany	1.7	1.2
Netherlands	1.4	1.3
Other E.E.C.	3.7	2.8
U.S.S.R.	1.5	1.5
All Others (2)	12.0	9.5
TOTAL	76.0	25.5

SOURCE: "Exports - Merchandise Trade 1980",  
Ottawa: Statistics Canada.

NOTES: (1) Exports to U.S. by water dropped from \$2.9 billion in 1979 to \$2.6 billion in 1980.

(2) The individual contribution of the remaining countries is less than 1 billion and widely dispersed.

Although Table 2 clearly documents that Canada's major export trading partner is the United States, her major seaborne trade goes to non-U.S. destinations. Yet, this table does not reflect the nature of Canadian trade. Table 3 shows that the range of commodities is as diverse as the trading partners involved. Most of Canadian trade to the United States travels overland. The percentage moving by water is a small component of that total, and consists mostly of iron ores, newsprint and petroleum products. Canada's major seaborne exports are destined for Japan and the E.E.C. countries, and the Soviet Union. Their commodity interests are detailed in Table 4.

TABLE 3

1980 CANADIAN EXPORTS BY COMMODITY WITH LARGEST BUYERS

(in millions of \$Cdn.)

COMMODITY (1)	VALUE	LARGEST BUYERS
<hr/>		
Fish, Fishery Foods	\$1,244 U.S. (53.3%),	Japan (9.1%)
Wheat	3,795	
Iron Ores and Concentrates	1,241 U.S. (53.7%),	Other EEC (27.3%)
Petroleum	2,899 U.S. (100%)	
Natural Gas	3,983 U.S. (100%)	
Lumber, Softwood (2)	3,263 U.S. (61.2%)	
Woodpulp (2)	3,870 U.S. (49.4%),	Other EEC (23%)
Newsprint (2)	3,681 U.S. (79.5%)	
Petroleum and Coal Products	2,324 U.S. (66.3%),	Other EEC (14.7%)
Iron & Steel	2,039 U.S. (70.1%)	
Non-Ferrous Metals	6,069 U.S. (66.3%),	U.K. (7.7%)
Motor Vehicles	7,351 U.S. (91.3%)	
Motor Vehicle Parts	3,465 U.S. (88.1%)	

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- NOTES: (1) An assessment of commodities solely on the basis of value can be misleading. For example, asbestos (exports=\$630 million) is a very low value commodity that is a major volume export to 83 countries in 1980.
- (2) Wood and Paper Products account for 16.4% of exports by value.
- (3) In this case, Other E.E.C.denotes non-U.K. buyers.

SOURCE: "Exports - Merchandise Trade, 1980", Ottawa: Statistics Canada.

TABLE 4

## 1980 CANADIAN EXPORTS BY WATER WITH LARGEST BUYERS

COMMODITY (1)	LARGEST BUYERS OF WATER BORNE EXPORTS (2)
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Fish, Fishery Foods	Japan, U.S., U.K.
Wheat (3)	U.S.S.R.
Iron Ores, Concentrates	U.S., Netherlands
Lumber, Softwood	Japan, U.K., France
Woodpulp	Japan, W. Germany, Italy, U.K.
Newsprint	U.S., U.K.
Petroleum & Coal Products	
Fuel Oil	Netherlands, U.S.
Gasoline	U.S.
Other	Japan
Iron & Steel	Product Dependent
Non-Ferrous Metals	U.K., Japan
Motor Vehicles & Parts	Venezuela

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NOTES: (1) This table can not be as precise as Table 4 because commodities are only given in 3 digit rather than 5 digit codes.

(2) In order of importance

(3) Includes cereals.

SOURCE: "Imports - Merchandise Trade, 1980" Ottawa: Statistics Canada.

It is insufficient to identify solely major seaborne cargo destinations, as adoption of either the Hamburg or the Hague/Visby Rules will affect Canadian imports as well. Therefore, the origins and nature of Canadian imports also needs to be assessed. Tables 5 and 6 provide this information but unfortunately Canadian imports are not identified by mode of transport and therefore the seaborne component of this trade cannot be established. Nevertheless it is apparent that Canada imports goods chiefly from the same countries to whom she exports, excepting the Soviet Union and with the addition of Saudi Arabia and Venezuela as sources of petroleum.

TABLE 5

ORIGINS OF CANADIAN IMPORTS - 1980  
(in billions \$Cdn.)

IMPORT ORIGINS	VALUE
U.S.	\$48.5
Japan	\$ 2.8
U.K.	\$ 2.0
Other E.E.C. (1)	\$ 3.6
Saudia Arabia	\$ 2.5
Venezuela	\$ 2.2
All other (2)	\$ 7.5
Total	\$69.1

SOURCE: "Imports - Merchandise Trade, 1980"  
Ottawa: Statistics Canada

- NOTES: (1) West Germany is the only E.E.C. country other than the U.K. which exports to Canada than Cdn \$1 billion in goods.  
(2) No single country in this category accounts for more than \$1 billion in imports to Canada.



TABLE 6

1980 CANADIAN IMPORTS BY COMMODITY WITH LARGEST SELLERS  
(in millions \$Cdn.)

COMMODITY	VALUE	LARGEST SELLERS	
1. Road Motor Vehicles	13,479	U.S., Japan	88
2. Coal, Crude, Petroleum and related products	7,732	U.S. Saudi Arabia (1) Venezuela (1)	32
3. Special industry Machinery	4,330	U.S. 79.5%, Other EEC	8.
4. Chemical and related Products	3,354	U.S. Other EEC	78 10
5. Non-ferrous metals	2,578	U.S. Other OECD	83 7
6. Communications and related equipment	2,230	U.S. Japan	66 16
7. Metal in ores, concentrated scrap metals	2,125	U.S.	70
8. Office Machines and Equipment	1,093	U.S.	89
9. General purpose industrial machinery	1,880	U.S.	75
10. Aircraft	1,828	U.S.	93
11. Iron and Steel products	1,414	U.S. Japan	52 16
12. Textile Fabricated Materials	1,275	U.S. Other EEC	59 11
13. Tractors	1,203	U.S. Other EEC	85 6
14. Measuring Lab. Equipment	1,176	U.S.	84
15. Metal Fabricated Basic Products	1,113	U.S. Japan	78 6

NOTES: (1) Percentage not available

SOURCE: "Imports - Merchandise Trade, 1980"  
Ottawa: Statistics Canada

So far it is evident that Japan, the United States, the United Kingdom and to a lesser extent the other countries of the E.E.C. are major Canadian trading partners, and that Canada is a significant participant in world seaborne trade as an exporter of raw and semi-processed materials and an importer of manufactured goods. Yet the above statistics do not reveal the means by which these commodities move. Are they bulk shipments? What proportion of this trade is containerized? Under what type of documentation does the cargo move? These kinds of questions have to be answered in order to determine how the carriage Rules will apply to Canadian trade. Regretably, information by cargo type is not available from the merchandise trade statistics and therefore must be garnered from different sources which cannot be compared with the previously presented tables.

A review of Table 7 illustrates the diversity of cargo types. For example, one can note the predominance of liquid and dry bulk cargoes in St. Lawrence loadings and unloadings. Sept Iles, the second largest volume port in Canada, is noted mostly for its role in the iron ore trade. In Great Lakes trade, dry bulk is by far the dominant cargo type. At present it appears that bulk cargoes are the commodities most dominant in Canadian trade. Looking to the future, iron ore, grains and coal are expected to be the major marine loadings by 1990 with a projected share of the total loaded tonnage of 22.5%, 19.9% and 13.2% respectively. The major unloadings are projected to be grains, coal and crude oil with approximately 13-14% of

total Canadian tonnage each.<sup>2</sup> Given the role played by these bulk goods in both present and future seaborne trade, the implications of reforming COGWA would appear to be highly relevant for these cargo groupings.

TABLE 7

1979 INTERNATIONAL SEABORNE TRADE  
BY REGION AND MAJOR CARGO TYPES  
(in 000 metric tons)

<u>UNLOADED:</u>	Atlantic Region	St.Lawrence Region	Great Lakes Region	Pacific Region
TOTAL	17,281	23,594	28,271	6,309
BULK-LIQUID	12,760	7,904	*	542
BULK-DRY	1,107	10,549	27,299	3,210
CONTAINERIZED	2,836	*	*	542
GENERAL CARGO	578	*	*	2,033
<u>LOADED:</u>				
TOTAL	16,117	73,527	12,149	52,651
BULK-LIQUID	*	2,353	1,820	*
BULK-DRY	8,249	63,284	9,580	35,425
CONTAINERIZED	2,510	3,520	*	*
GENERAL CARGO	*	4,370	*	15,443

NOTES: \*Not Disaggregated

(1) Of the vessels loading and unloading at Canadian Great Lakes ports, virtually all are destined for or arriving from U.S. Great Lakes ports.

SOURCE: "International Vessel Traffic Statistics: 1979",  
Ottawa: Statistics Canada 54-004.

## B. PERSPECTIVE OF THE CARGO OWNER

In recent years, with the introduction of new transportation technologies such as containerization, the existing Carriage of Goods by Water Act and its incorporation of the Hague Rules has been seen by cargo owners to be biased in favour of the carriers. The Hamburg Rules are viewed as an attempt to redress the balance of responsibility between these two in a manner favorable to cargo interests. The specific advantages of commercial significance for cargo owners will now be discussed by reference to the legal changes already identified in Exhibit 1.

### 1. Extended Application of the Hamburg Rules

One of the major legal impacts of adopting the Hamburg Rules would be their extended coverage of all import and export traffic, and all contracts of international carriage, regardless of documentation, with the exception of charterparties. This extension of the Rules would increase the convenience of the law for Canadian importers in seeking compensation. Under the Carriage of Goods by Water Act only cargo owners of goods moving out of Canadian ports are able to avail themselves of Canadian law. As in-bound carriage does not fall under the Act, Canadian consignees have the difficulty of bringing an action under foreign law and possibly in a foreign port. The Hamburg Rules will benefit Canadian consignees by eliminating this complication. There is also a related benefit for the cargo claimant in the face of a clause

in the carriage agreement designating a distant site for adjudication. The cargo owner will be ensured the right, if he chooses, to bring his action in Canada. This change will increase the convenience of the application of the Rules for cargo owners.

## 2. Extended Scope of the Hamburg Rules

The range of goods to which the Rules apply would also be altered under the Hamburg Rules. At present, the carrier is not bound to take responsibility for either deck cargo or live animals. In addition, a container is not referred to as a distinct item for the purposes of ascertaining the liability of the carrier.

(i) First, the Hamburg Rules would afford more protection to the owner of live animal cargo in that he will become able to recover his losses if he can prove they were caused by the carrier. Live animals exported by water comprised only \$514,000 of 1980 Canadian exports.<sup>3</sup> This traffic is split almost equally between the U.S. and St. Pierre-Miquelon and is too small a component to be significant.

(ii) Secondly, deck cargo would be subjected to the Hamburg Rules. The most obvious application is to containerized traffic as containers are often stacked three high above the deck.

As carriers are not prevented by the Hague Rules from disclaiming responsibility for goods carried on deck, the



extent to which they in fact utilize this freedom is important. Practice indicates that such cargo is often carried under a bill of lading containing an optional clause which permits carriers to stow containers above or below deck as suits their purposes. The Canadian marine cargo insurance industry insures this cargo as if it were stowed below deck. Since carriers do stow the cargo above or below deck as they choose, they have been disinclined to avoid responsibility from a public relations viewpoint and have accepted responsibility as if the cargo were below deck. Thus, the concept of "deck" for containerized cargo becomes an irrelevant issue in practice. The Hamburg Rules would, in essence, follow what is now a current practice in so far as container carriage is concerned. The economic impact of changes in deck cargo laws would therefore appear to be more relevant to deck cargo of a general cargo nature, the value of which is not disclosed in published sources.

(iii) Finally, a container belonging to the shipper would be considered by the Hamburg Rules as a separate item for liability purposes; this certainly would be to the advantage of shippers who own their own containers. In an effort to take advantage of foreign market opportunities, some Canadian shippers of perishable cargoes have been forced to invest in their own refrigerated containers in order to counter difficulties in "reefer positioning" and trade imbalances. Although the extent of this practice is not known or

documented, it is clear that these individual shippers will benefit.

(iv) - (vi) In addition to an increase in the range of goods covered, the Hamburg Rules will also extend the carrier's period of responsibility to portside handling of the cargo in his charge, whether on shipment, transshipment or delivery. This change would be particularly advantageous to cargo owners as the "demand for intermodal services (is) expected to continue" in<sup>4</sup> Canada in the coming decade. The tackle-to-tackle standard expounded by the Hague Rules is not suited to an age of multimodal transportation. The Hamburg Rules, in response to the changing transport systems, intend that the contracting carrier shall become responsible for cargo all the while it is under his supervision. This reform means that the liability of the carrier will also extend to the acts of stevedores, terminal operators and cargo handlers generally, if these independent contractors are classed as his servants or agents. The compatibility of the Hamburg Rules with intermodal methods of transportation may be expected to be particularly advantageous to Canadian owners of containerized cargo. These benefits would be enhanced by the resolution by the Hamburg Rules of the problems of carrier identity. By allocating responsibility to the contracting carrier for through carriage, Canadian cargo owners will be significantly assisted in the event of concealed damage and injuries of uncertain cause.

### 3. Increased Documentation

The requirements regarding the contents of bills of lading will be increased by the Hamburg Rules, necessitating the introduction of new forms. However, the greater detail is intended to afford greater protection for the cargo owner in the event of loss and litigation, and the added documentation is not substantial vis-a-vis the total arrangements that have to be undertaken by the shipper.

### 4. Likelihood of Litigation and Burdens of Proof

To the extent that the Hamburg Rules will shift the burden of proof and will alter the time limits of claims against the carrier, the individual cargo owner would benefit in that he will have greater chances of gaining compensation for cargo damage. However, cargo owners as a group will suffer the "growing pains" associated with changed terminology that may increase the likelihood of litigation in the early years after adoption of the Hamburg Rules. It is purely speculative whether the total costs to be borne by cargo owners will increase or decrease as a result of these risks of litigation. See also Chapter VII.C.3.

### 5. Increased Responsibility for Care of Cargo

The new language of carrier responsibility under the Hamburg Rules is believed to imply the same standard of care as the Hague Rules. However, the occasions for the exercise of care are increased, and the list of excepted perils is abolished so that there will be no ready made excuses available to the carriers. In the event of cargo loss and damage,

carriers will always have to show that their conduct was reasonably careful in the circumstances. For cargo owners, there will therefore be a greater number of cases in which they will gain compensation. See also Chapter VII.C.1.

#### 6. Increased Limits of Liability

Changes to the limits of liability are amongst the most significant impacts of reforming sea carriage law. The cargo owner will benefit from higher monetary coverage of his losses but will also find that the new limits of liability established by any of the alternative set of Rules will be less than that provided by other transport conventions, and in real terms will be below those provided by the Hague Rules in 1924 (See Chapter III.G). Of greater importance, however, is the principle of international uniformity. The limits provided by the Hague Rules became nationally translated into a wide range of values encouraging "country" or "forum" shopping in the litigative process. The Protocol of 1979 to the Hague/Visby Rules and the 1978 Hamburg Rules are both expected to control this variability by pegging liability limits to SDRs. The success of this approach can only be determined by experience as SDRs have yet to be proven capable of countering inflation. Since the limitation of liability issues involved in altering ocean carriage legislation affects the shipowner and the marine insurer as well as the cargo owner, these issues will be discussed further in section D: Issues of Marine Insurance.

C. PERSPECTIVE OF THE SHIPOWNER

In the past the shipowner has benefitted from the various means available in carriage law to except or limit his liability for cargo damage. (See Chapter III. D & G.) Introduction of the Hamburg Rules is intended to reduce these opportunities for relief from liability for the carrier. A review of Exhibit 1 and section B will illustrate this intent. However, the changes may be expected to reduce the inclination of cargo owners to litigate, and to provide greater clarification of the obligations for both parties to the transaction. Although the shipowner has little to gain from the adoption of the Hamburg Rules, he might benefit in that the increased cost of individual claims may be offset by reduced litigation costs because fewer claims may require resolution in court.

D. ISSUES OF MARINE INSURANCE

Marine insurance is of two types - carrier and cargo insurance. On the carrier's side, a change to the Hamburg Rules would affect his Protection and Indemnity (P and I) insurance by increasing his risks through the expansion of responsibilities already discussed as well as through greater limits of liability. This shift in risks will also affect the marine cargo insurance industry due to the reduction in coverage required by shippers as a result of the greater coverage expected from P and I insurance.<sup>5</sup>

To assess the insurance aspects of the new port



responsibilities facing carriers, it is necessary to ascertain what proportion of damage occurs portside, on board and during loading/unloading. Contact with the marine cargo insurance industry highlights the difficulty of assessing the past claims record. The greatest number of claims are for mis-handling claims. These are of a relatively small dollar value per claim. Water damage claims, such as for a container lost overboard, are fewer in number but greater in terms of dollar cost to the insurer. It appears that the cargo insurance industry has either not assessed what proportion of claims, either in terms of number or value, falls into the portside damage category, or is reluctant to divulge this information. For this reason it is impossible to determine the value of the carrier's incremental responsibility for care of the goods or even assess the impact of the decision as to whether a stevedore is an agent or an independent contractor. Whatever the dollar impact of this increased scope of responsibility, one can only surmise that the increase will probably be reflected in greater P and I contributions.

Apparently, over the past few years, the package limitations' interpretations have increased P and I costs as has inflation in the cost of claims. The Hamburg Rules more clearly define that the limits of liability are to be based on the shipping unit (package) or weight. In the past, Canadian shippers have been advised to counter the ambiguities<sup>6</sup> of the Hague Rules with regard to the item of cargo by clearly stating on the bill of lading the enumerated contents of the container.

This practice has already influenced P and I costs to some extent. As a consequence the level of P and I contributions has been increasing. Given today's economic environment and the current level of inflation, P and I contributions can reasonably be expected to continue to rise, even without adoption of the Hamburg Rules. The adoption of the Hamburg Rules would continue a trend already established and therefore the incremental influence is not likely to be great.

Whether any increases in P and I costs, which a carrier might sustain as a result of reforming the Carriage of Goods by Water Act, will be passed on to his cargo clients will depend on a variety of factors. In recent years the cost of bunker fuel has risen and now represents 50%-70% of a ship's total operating costs, depending on the source cited<sup>7</sup>. Crew costs are also substantial. The cost of P and I insurance in the carrier's overall operating expenses, therefore, must be relatively small. In addition, freight rates are dependent on factors other than costs. For example, in a highly competitive market with considerable excess capacity, shipowners are more likely to absorb increased costs than to move towards increased tariffs. Therefore any increase in freight rates directly attributable to increased P and I insurance is likely to be small.<sup>8</sup>

The transfer of commercial risks to shipowners from cargo owners would result in a shift in emphasis from cargo insurance to P and I insurance. However, cargo insurance will still have important functions in sea carriage. Even though

the limits of liability will be raised by all of the new Rules, not all Canadian cargo would be covered. Given an interpretation of the limits of liability under the Hamburg Rules as approximately equal to \$3.00 per kilo in 1978, coverage would be provided for roughly 75% of aggregate Canadian overseas trade by value, and 60% of containerized Canadian international trade, based on 1975 trade statistics.<sup>9</sup> These limits largely cover those commodity import and export groups identified in Tables 4 and 6. High value cargo would not be completely covered, necessitating continued use of cargo insurance. As well cargo owners might not be willing to rely solely on coverage provided by the Hamburg Rules because of, for example, general average liabilities and the possibility of an uninsured bankrupt carrier. However, in spite of reduced risk, there will be little incentive for marine cargo insurers to reduce insurance premiums, unless a significant withdrawal of usage occurs, and so Canadian cargo owners could still be faced with similar cargo insurance costs.<sup>10</sup> It can be expected that adoption of the Hague/Visby or the Hamburg Rules will only result in an increase in total distribution costs for cargo owners if any increase in P and I contributions is passed along in increased freight rates, and if market forces are not adequate to reduce the premiums assessed by the marine cargo insurance sector.

In summary then, slight distribution cost increases due to the adoption of the Hague/Visby or the Hamburg Rules may occur but, if they do, they are not likely to be significant in

affecting the competitiveness of Canadian importers or exporters when considered on a per "selling unit" basis.

## E. ISSUES OF CANADIAN INTEREST

Two further issues have to be discussed before any conclusions concerning changes in Canadian carriage law can be made: (1) what perspective should be taken in the decision concerning adoption, the cargo owner's or the shipowner's? and (2) should the coasting trade be included in the drafting of any new Canadian carriage legislation?

1. Perspective: Canada is a nation of shippers. Twenty-five percent of 1980 Gross National Product was attributable to foreign merchandise trade.<sup>11</sup> On the shipowning side, Canadian vessel registry extends only to those vessels involved in Great Lakes traffic, the coasting trade and the fishery. In 1978 only four of the 263 vessels of the Canadian merchant fleet were involved in ocean-going international trade.<sup>12</sup> These statistics indicate that the deep-sea fleet entering or leaving Canadian waters is largely in the hands of foreign shipowners. Evidently, at present, the Canadian national interest lies in adopting the perspective of the cargo owner rather than the shipowner.

Even so, refinements to the perspective of the cargo owner must also be made. Since different commodities are normally carried in different manners, any changes in the Rules are likely to have distinguishable effects. Consequently, an assessment of commercial impacts must be commodity conscious. It would appear from the discussion in the latter part of section A above, that Canadian interest lies in supporting the



viewpoint of the owner of bulk cargoes. Table 7 illustrated that the majority of Canadian loadings and unloadings are of a bulk nature, and the previous discussion points to the importance of iron ores, grain, coal and crude oil to the future Canadian maritime trade. However, further questions must be asked about the circumstances surrounding the transit of these cargoes:

(i) Are these goods generally carried under documents that subject them to Hague Rules? If a bill of lading is commonly used, then the Carriage of Goods by Water Act imposes the Hague Rules on the transaction. But if a waybill or similar non-negotiable receipt is employed, the Hague Rules may not apply unless they are specifically incorporated by the terms of the document. Much of this traffic is believed to utilize some form of non-negotiable receipt but also to incorporate the Hague Rules. If this is true, adoption of the Hamburg Rules would affect this traffic in the ways previously discussed.

(ii) Are these goods generally carried in ships where the owner of the cargo and the owner of the ship are the same corporate entity? If so, the type of carriage legislation is irrelevant because the transaction is an entirely intra-corporate affair.

(iii) Are these goods generally carried by charterparty? If so, the goods fall outside the scope of all three sets of

Rules and therefore are not relevant to this commercial assessment. Canadian bulk trade is believed to fall largely into either the charterparty category or the intra-corporate transfer category or both. Consequently, Canadian policy should be oriented towards the interests of owners of containerized and other general cargo. The volume of general cargo passing through Canadian ports was previously discussed in association with Table 7. It is further evident from Table 8 that containerization plays a substantial role in the export of general cargoes through eastern Canadian ports. The low percentage of containerized cargo passing through Vancouver is believed to be the result of diversion through competitive West Coast ports. So it seems that changes in carriage legislation that impacts on owners of containerizable cargo are more important than first suspected.

TABLE 8

PERCENTAGE OF GENERAL CARGO MOVING IN CONTAINERS  
BY MAJOR PORTS

PORT	1978	1979
Halifax	75%	76%
Montreal	63%	69%
Vancouver	3%	3%

SOURCE: Shipping Statistics Yearbook, 1979, Bremen:  
Institute of Shipping Economics, pp.307-8.

2. Coasting trade: As the Hamburg Rules refer only to international carriage, the coasting trade would be exempt from them. Table 9, when reviewed in terms of cargo tonnage,

TABLE 9

## CANADIAN VESSEL ARRIVALS

## DOMESTIC CARRIAGE FIGURES

YEAR(1)	TRAFFIC TYPE	CARGO TONNAGE
		(million metric tons)
1978	Domestic	121.3
	International	178.3
1979	Domestic	157.9
	International (2)	199.7
1980	Domestic	165.5
	International	Not Yet Available

- NOTES: (1) The figures cannot be compared between 1978 and 1979 as a change in statistical compilation methodology took place.
- (2) International vessel statistics are collected from S-1 form or A-6 form and/or manifest if submitted.

SOURCE: Telephone Interviews, Mr Gaetan Boucher, Marine Policy and Planning, Transport Canada, and Mr. Wayne Reinhard, Statistics Canada.

illustrates that a large percentage of total seaborne trade is of a coasting nature. Exclusion of the coasting trade from the application of the Hamburg Rules would further complicate the litigative process in that there would be two sets of law, one for domestic and another for international carriage. Such confusing diversity would not likely be of benefit to either Canadian cargo owners or shipowners. For the sake of clarity, it would be preferable to have one set of Rules. The effect of this legal change on shipowners engaged in coasting trade is

dependent upon the extent to which coasting carriers take advantage of the right to exempt themselves from the operation of the Hague Rules, but that is unknown.

3. An ulterior issue that should be mentioned in passing is the impact of changing carriage legislation on cargo diversion. Canadian ports may not benefit from the adoption of the Hamburg Rules. The response of the U.S. cargo owners to Canadian reforms may reduce port income in that American cargoes currently passing through Canadian ports might be diverted to U.S. terminals. According to 1978 figures, 20% of ex-Montreal container traffic originated in the U.S. Midwest<sup>13</sup>. How much, if any, of this traffic would be diverted to U.S. east coast ports cannot be forecast. Conversely how much Canadian traffic currently utilizing U.S. ports, for example Seattle, would be diverted to Canadian ports is equally indeterminable. Trade diversion is dependent on many things; carriage law may only be a minor variable.

#### F. CONCLUSIONS

Canadian national interest for the time being at least, seems to align with the perspective of the cargo owner. Therefore, Canadian commercial policy should reflect the impacts of the alternative sets of Rules on this group as well as on each individual cargo owner. The Hamburg Rules offer major commercial advantages over the Hague Rules for the

Canadian consignee and the Canadian owner of containerizable cargo. The greater onus placed on the carrier for proof provides an important intangible benefit for Canadian claimants. In addition, the limits of liability are raised. The Hague/Visby Rules advance this benefit to cargo owners, but their limits would be exceeded by the Hamburg Rules whose limits can generally be considered adequate for a majority of Canadian imports and exports.

For an individual cargo owner, the Hamburg Rules will increase the level of documentation, but that change is relatively slight in proportion to the total documentation required for shipment. Also, any distributive cost increases will be very small when related to "per selling unit" costs.

In general comparison to the Hague Rules, the commercial benefits of the Hamburg Rules would appear to exceed their disadvantages for cargo owners. The Hamburg Rules would also confer intangible benefits not provided by the Hague/Visby Rules. Thus, bearing in mind the constraints of available information, the commercial considerations suggest that adoption of the Hamburg Rules is in the Canadian national interest.

#### FOOTNOTES

1. It is noted that tonnage or other suitable measure of cargo space is preferable to dollar value of trade in assessing Canadian commodity flows. In the Statistics Canada publication "Exports: Merchandise Trade" for example, the unit of measure is not always tonnes; the quantity measure for pulpwood is cords, for lumber board feet, for machinery number, for petroleum products gallons, for petroleum barrels, etc. Even so, only total



export quantities are reported and not disaggregated by mode of transport. So dollar value is the only measure available that allows comparison of seaborne trade of major commodities by trading partner.

2. "Canadian Freight Transportation System Performance and Issues: A Discussion Paper", Ottawa: Transport Canada Strategic Planning Group, p.38.
3. Compiled from "Exports - Merchandise Trade", 1980, Ottawa: Statistics Canada.
4. Supra, footnote 2, p. 32.
5. Canadian based P and I insurance is not of concern here; the Canadian Shipowners Mutual Assurance Association, Canada's only P and I insurance company as listed in Fairplay World Shipping Yearbook, 1981 , p. 506, provides coverage only for war risk.
6. As an example, see "Canadian Traffic and Transportation" Vol. 2, Chapter 12.13.3., p. 103.
7. 50% has been cited by Norwegian Shipping News, Feb.29,1980, p.3; 60% has been cited by Lloyd's Shipping Economist, August 1979, p.8 and July 1980 p.16; 70% has been cited by Seatrade, December 1979, p.13.
8. One must note that freight rates have not been higher in cases where the packages were enumerated.
9. This is a rough interpretation only of the information in Table 1 page 18 of "Unit Values of Commodities Moving in Canadian Overseas Trade", Ottawa: Research Branch of Canadian Transport Commission, February 1978. In this table, for a unit value of \$2.20 per kilogram, the approximate Hague/Visby coverage, 71.8% of aggregated trade and 52.9% of container trade was covered. If the limits of liability were increased to \$3.30 per kilogram, this coverage increased to 77.1% and 61.8% respectively. The limits of liability set by the 1979 Protocol would provide coverage for a percentage of trade substantially the same as the Hague/Visby Rules.
10. Alternatively, a reduction in cargo insurance requirements may mean a rationalization within the industry resulting in fewer firms with more oligopolistic pricing policies meaning subsequently higher premiums. The impact on pricing can only be speculative given the lack of cost or claim information.

11. K.C. Dhawan, H. Etemad and R.W. Wright, Canada in the World Economy: A Canadian Perspective, (Don Mills, Addison - Wesley Publications, 1981), p.1.
12. Shipping Statistics Yearbook 1979, (Brémen, Institute of Shipping Economics, 1979), p. 166. It must be noted that these statistics are difficult to discuss further as Great Lakes trade is not disaggregated into international and domestic components.
13. 1978 Port Comparison Study computer data base, Canadian Marine Transportation Center, Halifax, Nova Scotia.



CHAPTER VII SUMMATION OF LEGAL IMPACTS OF ADOPTING THE  
HAGUE/VISBY OR THE HAMBURG RULES

The changes in Canadian carriage law which the Hague/Visby Rules and the Hamburg Rules would render, have already been summarized throughout this report. Now it is necessary to summate these legal impacts in order to determine if there are sufficient reasons to adopt either set of Rules and so to reform the Carriage of Goods by Water Act. The commercial rationale for this decision has been discussed in Chapter VI. It is the legal considerations in the choice of Rules to apply in Canadian law that are considered here.

The commercial and legal impacts of changing the Rules have both macro and micro effects. Commercially, the Rules affect the business of sea transportation as a whole, as well as the particular cargo owner in relationship to the specific carrier. However, the commercial overview places greater emphasis on the industry-wide perspective. The legal effects of the Rules are chiefly significant to each carriage transaction individually. The Rules are applied so as to resolve the immediate dispute between a carrier and a cargo owner without much regard to economic concern for the industry. The summation about to be made of the legal impacts of adopting either the Hague/Visby or the Hamburg Rules draws on those changes of law already noted in the body of the report which appear to be material. The discussion is framed in terms of

the Hamburg Rules, but the Visby amendments are also included where they would provide an alternative revision of the Hague Rules.

The criteria to be used to evaluate the legal effects of replacing the Hague Rules with the Hamburg Rules may be expressed as three distinct questions. 1) Will the Hamburg Rules be more comprehensive than the Hague Rules in their regulation of carriage transactions? 2) Will the Hamburg Rules provide greater clarity in the law than the Hague Rules? 3) Will the Hamburg Rules distribute the risks of sea carriage more fairly than the Hague Rules in contemporary shipping conditions? The justification for, and the conclusion of, each of these questions will be discussed in turn.

A. Comprehensiveness of the Rules

Both the Hague and the Hamburg Rules are intended in principle to be mandatory codes that exclusively regulate the rights and obligations of the parties to a carriage transaction. See Chapter II.D.1. The exclusivity of the Rules reflects the international achievement of an agreed balance of risks in sea carriage. Their mandatory character ensures that the distribution of risks cannot be upset by one party, or even by agreement except to increase responsibilities. The parties are free, however, to contract as they see fit about carriage matters outside the application of the Rules, and even thereby to circumvent their intended effects. Such undesirable results



may be overcome by more complete regulation. Since the objectives of the Rules are identical, it seems entirely appropriate to compare their scopes of application and to prefer the set that is more comprehensive.

In a number of respects the Hamburg Rules are more comprehensive than the Hague Rules, and never less so. Only the differences between the Rules will be noted here, with a cross reference to relevant sections of the report.

1. The Hamburg Rules will apply to all contracts of carriage, except charterparties. Whereas the Hague Rules only apply to goods intended to be "covered by a bill of lading", the Hamburg Rules will have effect regardless of whether the goods are carried under bills of lading, non-negotiable receipts, waybills or similar kinds of documents. The practical extent of this change will depend on the kinds and volumes of goods that are not already carried under the Hague Rules either by statute or else by agreement. See Chapter VI and Appendix B on Waybills. For those trades that are not at present customarily subject to the Rules, this extension of their application will be significant. See Chapter II.B.1 and 2.

2. The Hamburg Rules will operate on inbound goods in addition to outward cargoes, which alone are regulated by the Hague Rules as enacted by the Carriage of Goods by Water Act. The Hague/Visby Rules would also attempt to extend to inward

carriage, but the means used are so indirect that their success is in doubt. Application of the Rules to inbound cargoes will permit Canadian importers to press their claims in local courts by locally incorporated law. This change is one of the most important for cargo owners because it will induce the application of the same law for shippers and consignees alike. See Chapter II.B.3.

3. The period of carrier responsibility is supposed to be extended by the Hamburg Rules. The tackle-to-tackle rule is intended to be replaced by port-to-port obligations, though on close reading the carrier may be able to draw the carriage contract so as to avoid any change. While the purpose of the change is to provide uniformity amongst the divergent national laws about the carrier's responsibility for the goods on land, it will also make the Rules coterminous, and thereby fully comprehensive, with his custody of the cargo for the purpose of carriage. See Chapter II.B.4.

4. In addition, any intervening transshipment of the goods will no longer terminate operation of the Rules, for the Hamburg Rules will hold the contracting carrier, or at least a named actual carrier, responsible for the cargo until it is delivered to the consignee. See Chapter II.B.5. Together with the port-to-port rule, this is an important extension of the Rules.

5. Deck cargo will become subject to the Hamburg Rules,

but with some special regulation. See Chapter II.C.1.

6. The mandatory character of the Hamburg Rules will be reinforced by a new provision for penalties' in the form of compensation for losses caused by the inclusion of invalid clauses in the contract of carriage. See Chapter II.D.1.

7. Additional information will have to be included in the bills of lading issued under the Hamburg Rules. In particular, all the ports of loading and of discharge must be named so as to be able to determine whether the Hamburg Rules will apply. Any freight payable by the consignee must be noted so as to give him notice. The contracting carrier and any other actual carriers must be named in order to inform the cargo owner for the time being of the identity of the person responsible for his goods. See Chapter III.A.

8. Delay in delivery of cargo will be expressly regulated for the first time by the Hamburg Rules. Although the Hague Rules do not refer to them, claims for delay are usually admitted as improper care of the cargo. Indeed the special attention of the Hamburg Rules to delay may turn out more limiting for the claimant than his ordinary claim for damage through carelessness. See Chapter III.F.

In conclusion, the Hamburg Rules are, without a doubt, more comprehensive than the Hague Rules in many ways, some of which are substantial and important. The Visby amendments will not revise the Hague Rules so as to make them more

comprehensive except, possibly, in one respect.

## B. Clarity of the Law

Carriers, cargo owners and their lawyers all place value on clarity in the law because it encourages certainty of obligations in carriage. In commerce it is often preferable to have certain, even if bad, rules rather than unclear ones or none because the risks and costs of doing business can at least be insured and accounted. In law, clarity in the Rules reduces litigation and its ensuing wastefulness. What follows is a conceptual balance sheet of the relative clarities and obscurities of the Hamburg Rules compared to the Hague Rules, both as they are at present enforced in Canada and as they might be reformed by the Visby amendments.

### Clarifications of Old Problems

1. A cargo claimant's difficulties in ascertaining the person liable for his losses will be considerably diminished by the principle of the Hamburg Rules in that responsibility for the entire carriage shall rest on the contracting carrier who shall be identified in the bill of lading. See Chapters II.A.1, B.5, and III.A.

2. The multiple obscurities of invoking the Hague Rules only upon issuance of a certain kind of document will be abolished. Reference to the clause "covered by a bill of lading or any similar document of title" will be obviated by

the Hamburg Rules since they will apply to contracts of carriage regardless of documentation. See Chapter II.B.1.

3. Several problems about the itemization of cargo for the purposes of limiting the carrier's liability will be resolved by the Hamburg Rules. A unit of cargo will be settled as the shipping unit. Containerized parcels of goods, if they are enumerated in the bill of lading, will definitely be treated as individual packages but not otherwise. The container itself, if supplied by the shipper, will be treated as a separate shipping unit. The Hague/Visby Rules would impart only the second of these clarifications. See Chapters II.C.3, III.G.

4. Both the Hague/Visby and the Hamburg Rules will ensure to the employees of the carrier the benefit of liability limitation to the same extent as their employer when acting within the scope of their employment. They will no longer have to rely upon the uncertain effects of the Himalaya clause. See Chapter II.A.3.

#### Persisting Obscurities

5. However, while the extension of liability limitation in the Hamburg Rules by the use of the phrase "servant or agent of the carrier" clearly will include his employee, the plight of his independent contractors, such as stevedores, will remain obscure. Likewise, their express exclusion from the Hague/Visby Rules will leave Canadian law in its present



confused

state. See Chapter II.A.4.

6. Ship design often does not assist the legal distinction between cargo carried on or below deck. Indeed in the containerized trade, the physical distinction is irrelevant. See Chapter VI.B.2. The Hamburg Rules will exacerbate the need for the distinction because of the special regime they create for deck cargo. See Chapter II.C.1.

#### New Obscurities

7. While the Hamburg Rules carefully define the relations of the carrier and the shipper, they do not explain the involvement of the consignee. Canadian law does not admit the transfer of contractual rights of carriage outside the Bills of Lading Acts. In those instances when the Hamburg Rules will apply in the absence of a bill of lading, the consignee may not have an enforceable claim against the carrier, or vice versa. See Chapter II.A.2.

8. The extension of the carrier's responsibility under the port-to-port principle is seriously queried by the way the Hamburg Rules define the period of custody of the cargo. The carrier will be deemed to be in charge of the goods on so many alternative grounds that much uncertainty in the principle is aroused. See Chapter II.B.4.

9. The new and pervasive standard of carrier responsibility under the Hamburg Rules will inevitably need

clarification through litigation. "All reasonable measures" is conclusionary language that does not explain the standard of reasonableness. Presumably it will be roughly equivalent to the current understanding of the carrier's obligations to act with due diligence to make his ship seaworthy and to look after the cargo properly and carefully. The main uncertainty is how much of the old jurisprudence, particularly those cases surrounding the excepted perils that are to be abolished, will be permitted to infuse the new standard of care. See Chapter III.B, C, and D.

In summation, each of the four clarifications of old problems provided by the Hamburg Convention will ease the application of the Rules in important ways. The Hague/Visby Rules would only contribute in part to two of these beneficial changes. The two persisting obscurities may be opportunities for clarification that were missed, but they will not significantly detract from the Hamburg Rules compared to the Hague Rules since they apply to both. Indeed, the distinction between independent contractors, and servants and agents, which is a feature of common law in Canada but is unknown in civil law countries, could be abolished in this instance at the time of enactment of the Hamburg Rules, if they are adopted.

The new obscurities, which the Hamburg Rules will create, may be more serious. The consignee's difficulties will occur infrequently and are essentially a problem of the common law in Canada. They can be rectified by amendment to broaden

the application of the Bills of Lading Acts to other kinds of carriage documents. The uncertainty surrounding the port-to-port principle and the standard of cargo care will invite litigation for they are crucial elements in the relations between carrier and cargo owner. Perhaps the best that can be said is that some risk of obscurity and pursuant litigation always attends major law reform. Indeed, vague drafting in other places in the Hamburg Rules may create further uncertainties in the carriage contract in practice. Of the incidents forecast in this report, on balance the clarifications of old problems appear to outweigh the creation of new obscurities.

C. Fairness of the Risks

The principal function of both the Hague and the Hamburg Rules is to distribute the risks of a sea carriage transaction. The Hague Rules sought to set a balance of rights and obligations between the carrier and the cargo owner that was fair to both under the conditions of ocean transportation in the nineteen twenties. The principal motivation for the new Hamburg Rules was a perception that substantial changes in the shipping industry during the last fifty years have changed the risks of carriage and thus rendered the Hague Rules unbalanced between the parties. The Hamburg Rules aim to reset a fair balance of rights and obligations in sea carriage under contemporary circumstances.

This justification of the principle of fairness as a criterion for evaluating the Rules does not, however, provide much content to the standard to be applied. Perhaps the first line of approach should be to consider whether the Hamburg Rules redistribute the risks and costs of carriage so as to rebalance them in an equivalent way to the Hague Rules under modern conditions. Help may also be obtained from other areas of commercial law which operate the principles that a transaction is undertaken in good faith and that business efficacy shall be given to it. These ideas may be of some use in the assessment of on-going carriage contracts but general notions of reasonableness may be all that is left when performance expectations break down in loss, damage, and dispute.

### Standards of Care

1. The new requirement of the Hamburg Rules that the carrier shall take all reasonable measures throughout the carriage transaction will apply uniformly to the currently distinct incidents of the seaworthiness of his ship, his care of the cargo, his deviation in the voyage and his delay in delivery. Although the new language is believed to imply the same standard of care as the Hague Rules in each of these incidents, the occasions when the carrier will have a responsibility to exercise this care are increased. First, the carrier will not only have to put up a vessel that is seaworthy in all respects at the beginning of the contracted carriage,

but he will also have to maintain it in that condition through the voyage. This change is indeed an enlargement of the carrier's obligations but it has always been an anomaly of the Hague Rules that he must have a care for the cargo but not for his ship while carrying it. This redistribution of responsibility should not be viewed as more than the completion of an existing but inchoate obligation. See Chapter III.B.

Secondly, the abolition of the list of excepted perils will strip the carrier of ready made excuses for his carelessness. In future he will have to prove in all events, except fire, that he exercised reasonable measures of care. No doubt the carrier will be able to assert in appropriate cases arguments that are substantially the same as many of the present exceptions in defense of the reasonableness of his behaviour. His responsibility presumably still will not encompass the acts of others, such as God, public enemies, princes and rulers, or shippers. Similarly, causes of loss that are not the carrier's fault, such as quarantine, riot, insufficiency of packing, inadequacy of marks, hidden defects and inherent vice of the goods, supposedly will not be held to his account so long as they are beyond reasonable measures of prevention or protection by him. The most important changes concern the carrier's responsibility for the acts of his employees and for fire.

In the event of damage caused by fire, the carrier will no longer be able to exempt himself of liability without



enquiry, but he will not be held responsible until the claimant can prove his default in its prevention or elimination. Thus the risk of loss by fire will be subject to the same consistent determination whether the carrier took all reasonable measures of care. Cast in this light, the explicit reference to fire in the Hamburg Rules seems unexceptional and indifferent from any other cause of loss which may occur beyond the reasonable control of events by the carrier.

He will also be unable to exclude liability for the carelessness of his master and crew in the navigation and management of his ship. This ancient exception reflected an era of shipping that lacked any means of communication between the shipowner and his vessel after the voyage. He relied entirely on the independent judgment of the master he employed. It was asserted then that the shipowner should not be responsible for the acts of a person, albeit an employee, whom he could not supervise or direct. If this argument was ever valid, it certainly is not so today. Modern communications systems make possible continuous contact with any ship anywhere in the world. There is no longer any substantial ground to relieve a carrier of the vicarious responsibility for the acts of his master and seamen which accrue to him in the ordinary course of being their employer. Although this change in the Rules is sensitive amongst shipowners, it may be seen as an instance where the Hamburg Rules will redress the balance of carriage risks to the level originally intended by the Hague

Rules consistent with current shipping systems. See Chapter III.C and D.

2. The new standard of care will be subject to three modifications not known to the Hague Rules. These concern deck cargo, live animals, and dangerous goods. In becoming subject to the Hamburg Rules, cargo that is carried on deck by agreement will fall into the responsibility of the carrier upon the ordinary standard of care. This change of carrier's obligation is justified by the reduction in disparity of risks of carriage on and below deck brought about by the modern developments in shipping methods. But the Hamburg Rules will go further and will impose liability on the carrier, without reference to whether he took any measures of care, for the loss of cargo carried on deck without the agreement of its owner and as a result of being carried that way. This imposition can only be regarded as a penalty against the carrier possibly for his breach of business efficacy and good faith. See Chapter II.C.1.

The provisions for live animals are less exceptional. While they will become subject to the Hamburg Rules and thus will have to be tendered the ordinary standard of care, the carrier will not be held liable for loss resulting from any inherent special risks. This addition to the carrier's responsibilities is justified, it seems, on the basis that he should afford at least ordinary care for all the kinds of goods he agrees to carry. The Hamburg Rules will not demand more,

though they will invite a dispute in the event of a loss as to whether it resulted from an ordinary or a special risk. However, such disputes ought to be minimized by the further provision that, provided the carrier complies with any special instructions of the owner, the loss of the animals will be presumed to have been caused by their special risks. See Chapter II.C.2.

The Hamburg Rules perpetuate the principles of the Hague Rules regarding dangerous goods with one variation. The ordinary principles require a carrier who accepts goods knowing they are dangerous to take appropriate care of them, but permit him to jettison or destroy them if they become an actual danger to his ship or to other cargo. The Hamburg Rules point out that if the carrier destroys the goods in these circumstances he may still be liable to compensate their owner for his loss. Such legal liability will be incurred where the carrier failed to take reasonable measures of protection consistent with the dangerous character of the particular goods. Thus the apparent variation from the ordinary standard of care is but a particular illustration of the fact that the carrier's measures must always be reasonable in light of the individual characteristics of the goods he has agreed to carry. See Chapter IV.B.

### Burdens of Proof

3. Many a case has been lost because the party who

bears the burden of proof cannot produce the necessary evidence. In carriage cases under the Hague Rules such a consequence has often befallen a party as a result either of an unfortunate uncertainty about who does bear the onus of proof, or of the physical or financial impossibility of uncovering the necessary evidence. The new basis of responsibility in the Hamburg Rules clearly will impose the burden of establishing that all reasonable measures of cargo care were undertaken on the carrier. The importance of this requirement is enhanced by another rule of the Hamburg Convention, to be found also in the Hague/Visby Rules and in existing Canadian law, that the information on the face of the bill of lading about the quantity and condition of goods shipped on board will be conclusive proof in the hands of the consignee. This clarification of the evidentiary burden will be a marked improvement of itself over the Hague Rules. The result undoubtedly will be to switch the onus of proof in some instances from the cargo owner to the carrier and thereby to increase his risks. The justification would seem to be that the carrier is in the best position to explain his own actions and thus to show that he took reasonable measures. Moreover, in some instances the actual onus may even be reduced. While at present the cargo claimant may be incapable of discovering the physical cause of his loss in some distant port or at sea, in future the carrier, in addition to having relatively much better access to such information, will not necessarily be called upon to show what happened at all. He will only have to

prove the actions of himself and his employees, and their reasonableness. It may also be said that the Hamburg Rules on proof reassert with clarity a principle known to the Hague Rules before it was lost in the confusion of applying so many exceptions. See Chapter III.A, B, and C.

4. The Hamburg Rules themselves are not without exceptions regarding proof. They concern losses of live animals and damage by fire. In both situations the cargo claimant will have to prove that the behaviour of the carrier or his employees was faulty or neglectful. In the case of live animals, this accretion of obligation on their owner seems to be a compromise for including them within the Hamburg Rules and thus imposing responsibility for their care on the carrier. The burden of proof in the event of damage by fire, though expressed as an exception to the principle of the Hamburg Rules, is probably not an alteration of the Hague Rules. See Chapters II.C.2 and III.D.

#### Limits of Liability

5. The addition of limitation by weight, the clarification of shipping units, of containerized cargo, and of articles of transport, and the raising of monetary limits committed by the Hamburg Rules, and to a lesser extent by the Hague/Visby Rules, will all increase the liability of the carrier to the benefit of the injured cargo owner. The changes are to rectify the measure of compensation recoverable under



the Hague Rules. This measure, it is asserted, has diminished to an unfair level. While the value of the sum of money fixed by the Hague Rules has certainly fallen, the criterion of fairness of itself does not apply to amounts of money unrelated to circumstances. Yet the purpose of liability limitation is to control compensation within known boundaries regardless of the kind or value of the cargo, unless the owner is prepared to declare his goods and pay a premium on their carriage. The merits of this regime are that it permits both cargo and shipowner to calculate their business risks in advance, to fix their costs or charges, and to purchase insurance to foreseen levels. From the legal perspective, the important concern is whether the fixed limit of liability is at least great enough to induce the carrier to undertake precautions for the care of the cargo. If it is not, there will be no incentive for the carrier to fulfil his legal responsibility to look after the goods he is carrying, at any rate beyond the care he may be expected to take of his own ship that may coincidentally protect the cargo.

The monetary limitation will be a sufficient inducement to the carrier if his liability thereby is more than the costs of reducing the risks of cargo loss or damage by taking precautions. The original sum set by COGWA in 1936 evidently was adequate. Although the Protocols of 1968 (Visby) and 1979 may double the limit per package, and the Hamburg Rules may raise it two and a half times, depending on the Canadian dollar

rate against SDRs at the date of exchange, these amounts are well below the compensation afforded by the Hague Rules in 1936 money values. The highest limit, offered in the Hamburg Rules by weight, has been estimated to cover about 75 percent of Canadian cargoes. Whether this level of indemnity is sufficient to induce carriers to take care is not a matter of calculation, only of affirmative conjecture. In any event, it can be firmly said that both the amending Protocols and the Hamburg Rules will go towards reestablishing the measure of liability fixed by COGWA in 1936 and in that sense are fairer in today's circumstances than the unrevised Hague Rules. In addition, the specification of the new monetary limits in terms of SDRs will encourage greater uniformity of awards under the Hague/Visby or the Hamburg Rules than is achieved, though intended, by the Hague Rules. See Chapter III.G and Appendix E.

6. Claims for losses through delay will be subject to their own special limits by reference to the freight. There is no evident reason why this is a fairer procedure of limitation. Although the Hague Rules do not expressly regulate delay, no difficulties are met in including it within the carrier's responsibility of care for the cargo and thus in awarding compensation according to the ordinary principles. See Chapter III.F.

7. The limits of liability may be overreached in some circumstances. By common law principles of contract the

carrier may be prevented from limiting his liability under the Hague Rules if he is fundamentally in breach of his carriage agreement. An unjustified deviation is the common example. The Hague/Visby and the Hamburg Rules will explicitly regulate the occasions when liability limitation is lost by judging the carrier's behaviour according to standards of wilfulness and recklessness. One such action that is expressly mentioned in the Hamburg Rules will be the carriage of goods on deck contrary to an express agreement to stow them below deck. Consequently there will be a reduction in the carrier's risk of loss of the benefit of liability limitation at least as practised in Canada. The justification seems to be the achievement of international uniformity in the place of national diversity over this matter. The occasions of reduced compensation to Canadian cargo owners will not be frequent. See Chapters III.F, G, and II.C.1.

8. Circumvention of the limitation on liability is also attempted by claimants by bringing suit against the wrongdoers personally. Employees, agents and subcontractors of the carrier are not granted the benefit of liability limitation by the Hague Rules and have therefore had to seek what protection they can from the inclusion of a Himalaya clause in the carriage contract. Their success has been mixed. The Hague/Visby Rules will permit employees, and the Hamburg Rules will allow employees and perhaps subcontractors also, to invoke the same rights as the carrier regardless whether the suit is

framed in contract, delict or tort. The change will cause a significant reduction in the cargo owner's compensation in some circumstances. This risk of increased loss to the cargo owner is to be justified on the grounds of the comprehensiveness of the Rules as carriage codes. The balance of risks achieved by the Hague Rules included limited liability. This distribution was never intended to be evaded by suits against alternative defendants. The Visby amendments and the Hamburg Rules try to redress the situation to its former balance. See Chapter II.A.3 and 4.

#### Procedures for Claims

9. In a number of respects the Hamburg Rules will relax the restrictions on cargo claims. The time limits for giving notice of loss and for bringing suit, the choice of locations for adjudication and for arbitration will all increase. Consequently the cargo owner's risks of loss of his claim will decrease. These rules have nothing to do with commercial efficacy even though they have an indirect impact on the business risks of carriage. The fairness of legal procedures has to be assessed by some other criteria. Of the time limits, it may be said that the changes reflect the experience under the Hague Rules that they were too restrictive. Indeed, the Hague/Visby Rules would make some partial reforms to relieve the pressure of time. The law does not desire to prevent diligent claimants from prosecuting their claims, only to cut off tardy ones. The Hague Rules have been found to cut off

claims before they can be properly organised, investigated, and negotiated. The regulation of the contractual terms of jurisdiction and arbitration is a new venture of the Hamburg Rules principally to give the cargo owner some choice of location in the face of the carrier's pre-selection by clauses of adhesion. The change may be said to set fairer grounds for the resolution of carriage disputes at least to the extent it reinforces the function of the Rules. Both the Hague and the Hamburg Rules seek to regulate the relations of the parties comprehensively in place of the freedom of one to dictate conditions for the other. See Chapter V.A, B and C.

In summation, the Hamburg Rules will make important changes favouring the cargo owner in standards of care, burdens of proof, limits of liability and procedures for claims. The carrier's side will benefit from a new rule preventing circumvention of the limits of liability. The Hague/Visby Rules will partially amend the limits of liability and prevent their circumvention. These are all shown to encourage greater fairness in the sharing of the risks of sea carriage. The potentially unfair changes affecting live animals and the fundamental breach of contract, to the loss of the cargo owner, are not important. Therefore the Hamburg Rules are judged to distribute the risks of the carriage transaction more fairly than either the Hague Rules or the revised Hague/Visby Rules.



## Conclusion

On all three grounds of enquiry the Hamburg Rules will be better than the Hague or the Hague/Visby Rules under contemporary conditions of carriage. They will be substantially more comprehensive in important ways. They will clarify old problems probably in more significant ways than they will create new obscurities. They will more fairly distribute the risks of carriage in those areas of change that are important. In sum the legal impacts of the Hamburg Rules favour their adoption.



CHAPTER VIII    CONCLUSION: THE CHOICE OF FUTURE WATER CARRIAGE  
LAW

Canada has only three choices, the Hague Rules, the Hague/Visby Rules or the Hamburg Rules. Mixing or meddling with the Rules is not an option. Each set is an internationally agreed regime for the uniform regulation of sea carriage. The uniformity it promotes would be defeated by individual amendment in the process of national adoption. Hence, the decision to be made is whether Canada should retain the Hague Rules as expressed in COGWA, should modernize them by amendment according to the Protocols of 1968 (Visby) and 1979, or should reform the law by adoption of the Hamburg Rules. These alternatives have been reviewed in depth from a legal perspective and canvassed summarily from a commercial viewpoint by this report.

There may be considerations other than legal and commercial ones that have to be taken into account in deciding what to do about the Carriage of Goods by Water Act. Political factors, of both a domestic and an international character, are likely to be relevant. The commercial overview mentions the possibility of traffic diversion between Canada and the United States. Appendix A on the multimodal transportation of goods marks the advent of international regulation of this traffic that is complementary to the Hamburg Rules in the sea mode. The attitudes of Canada's major maritime trading partners,

Japan, the United States, Britain and the European Community, may also present diplomatic constraints. However, these kinds of political matters are outside this legal and commercial review of COGWA. The separate results of the legal study and the commercial overview both point to the same conclusions. Their findings on the principal issues of concern in contemporary sea carriage will now be integrated.

The unrevised Hague Rules are evidently not adequate to meet the needs of modern conditions of carriage in significant ways. The commercial overview shows that Canada's main concern ought to be for the owner of containerized and other general cargo. Far from facilitating the movement of container traffic, the Hague Rules do not reach its associated problems of portside responsibility, transshipment, and the allocation of liability for concealed damage. Nor do they provide a measure of compensation that is in any way consistent from country to country, or with current cargo values, however the contents of the container are enumerated.

The Hague/Visby Rules and their amendment by the 1979 Protocol afford useful revisions of the Hague Rules regarding cargo compensation. The translation to SDRs as the units of account and the increase in monetary limits should provide an internationally more uniform measure of recovery for loss that would cover a significantly greater proportion of cargoes by value. The introduction of liability limitation by weight would eradicate the problems incurred by the need to itemize

loose and bulk cargo for the purpose of compensation. Otherwise, the Hague/Visby Rules do not substantially address the serious problems presented by containerized goods.

Upon reflection, the Hamburg Rules appear to offer much more in resolution of modern carriage problems, but at a cost. The chief legal costs of adopting the Hamburg Rules appear to be the introduction of new obscurities in the law through the use of untried terminology. The risk of litigation, and its associated costs, is thereby raised. The most obvious price of shifting commercial risks on to the carrier is to expect an increase in his P and I insurance costs, leading to increased freight rates for cargo owners. However, the commercial overview suggests that P and I contributions are not a significant part of a carrier's costs, nor does it indicate that the total distributive costs of a shipper will noticeably increase on this account, at least per item of cargo.

On the beneficial side, the legal study shows that the Hamburg Rules, through a combination of clarifying old laws and applying them more comprehensively, will meet all the principal problems of containerized goods in ways that will also assist other general or bulk cargoes. Substantial changes in standards of cargo care, burdens of proof, limits of liability, and procedures for claims are all expected to reestablish a fairer balance in the distribution of the risks of sea carriage. The commercial survey notes, in addition, the convenience that each of these changes would afford to cargo



owners. The carrier's side would benefit from a fair extension of his protections to his workforce, thus preventing circumvention of the Rules by cargo claimants. The Hamburg Rules would also introduce all the advantageous revisions of the Hague/Visby Rules. Indeed, they will impart even greater clarity in the computation of liability and better coverage of cargo value. Altogether, the Hamburg Rules exceed all forms of the Hague Rules in the regulation of international carriage of goods by sea.

## APPENDICES

In the course of research for this report a number of problems and developments related to ocean carriage but beyond the scope of a review of COGWA became apparent. Some of these, such as the political aspects of Canadian trading relations, are outside the professional expertise of the research team and so are not the subject of any comment in this report. Other matters of a technical, legal character were explored in a very preliminary way. They are included in four Appendices on:

- A. international regulation of multimodal transportation;
- B. developments in carriage documentation, especially waybills;
- C. constitutional uncertainty about jurisdiction over water carriage; and
- D. delivery of goods under the Canada Shipping Act.

They are offered as a brief introduction to these other subjects as they relate to Canadian water carriage law. They present the connection with the carriage law reforms under consideration, and they suggest areas that will need investigation if the recommendations of this report are pursued.

Other information on the application of the Rules by other countries, especially about the limits of liability, was collected. It is presented in three further appendices on:

- E. limits of liability under the different sets of Rules;
- F. comparative limits of liability by country; and
- G. national attitudes to the choice of Rules.

This information is offered for comparison with COGWA.

APPENDIX A UNITED NATIONS CONVENTION ON INTERNATIONAL  
MULTIMODAL TRANSPORT OF GOODS

Completed in 1980, the United Nations Convention on the International Multimodal Transport of Goods<sup>1</sup> is the third United Nations maritime transport convention to be signed in the last decade. It follows the Hamburg Rules and the Convention on a Code of Conduct for Liner Conferences.<sup>2</sup> The origin of all three conventions is the Shipping Division of UNCTAD. Consequently, the conventions reflect the policies of that organization and must be viewed interdependently against that background. This is not the place to examine the Multimodal Convention in detail<sup>3</sup> but a few comments will be made, first on its application and then on its interaction with the Hague and Hamburg Rules.

With the container revolution that commenced in the nineteen fifties came the capability and desire to unitize cargo in order to facilitate handling and carriage and to eliminate labour-intensive, time consuming, traditional break-bulk methods. Unitization of cargo made it possible for goods to be shipped and carried by a variety of transportation modes on route to their destinations. Commercial practice conceived documents that would facilitate such multimodal carriage and also encouraged the development of a new transport agent who has become known as the multimodal transport operator. He makes the original contract with the shipper and

undertakes to obtain the other necessary carriers and handlers so that the cargo reaches its ultimate destination. The purpose of the Multimodal Convention is to regulate multimodal carriage made through multimodal transport operators.

The Multimodal Convention is mandatorily applicable to every multimodal transport contract provided the state in which the goods are to be shipped or delivered is a party to the Convention (Article 3(1) and (2)). These provisions are comparable to the Hague/Visby and Hamburg Rules and should result in a broad application of the Convention which the commercial parties cannot exclude.

The most significant rule of liability in the case of cargo damage, whether or not it is attributable to a particular leg of the transport, is that the shipper can always recover from the multimodal transport operator. The burden is upon the operator to show that all measures that could reasonably be required to prevent the damage were taken. This fault provision mirrors the Hamburg Rules. The limits of liability in the Multimodal Convention are higher than the Hamburg Rules.

Although many of the articles in the Multimodal Convention are similar to the Hamburg Rules, the two regimes are to coexist. They will not conflict since one covers contracts of carriage purely by sea and the other reaches multimodal transport contracts. This dichotomy is preserved in Article 19 of the Multimodal Convention, where it states that



even if cargo damage is attributable to a particular mode the Multimodal Convention is the appropriate regulatory regime. An exception will be made when its limits of liability are higher in an applicable unimodal convention or national law. Then that limit, but not the entire regime, shall apply.<sup>4</sup>

How the Multimodal Convention might impact on Canada or whether Canada should become a party is beyond the scope of this report. These are important questions in light of the extent of Canadian interests in containerized trade. It is suggested that a shipper under the Multimodal Convention is better protected than under the Hague, Hague/Visby or Hamburg Rules since recovery will be against the operator with whom the contract was made regardless of where the damage happened, and the limits of liability would be higher. There are other aspects of the Multimodal Convention that may mitigate against these benefits to shippers. The only conclusion reached here is that the Multimodal Convention should not be viewed as an alternative to the Hague/Visby or Hamburg Rules, but it might be considered in conjunction with them.

### References

1. U.N. Doc. TD/MT/Conf./16, 10 June 1980 reprinted in (1980), 19 Int'l Legal Materials 983.
2. U.N. Doc. TD/CODE/II/Rev.1, 9 May 1974 reprinted in (1974), 13 Int'l Legal Materials 917.
3. See particularly: Gerald F. Fitzgerald, "The United

Nations Convention on the International Multimodal Transport of Goods" (1980), 5 Annals of Air and Space Law 51-87.

4. Ibid, at pp. 66-68 and Wei Ja Ju, "UN Multimodal Transport Convention" (1981), 15 J. of World Trade Law 283, at pp. 299-302.

## APPENDIX B    CARRIAGE UNDER WAYBILLS

One of the effects of the revolution in container cargo and the emergence of fast container ships has been the development of the waybill in place of the bill of lading. Modern ships travel so quickly that they often arrive before the bill of lading even though it is sent by air mail. In consequence a faster form of documentation has also been introduced. A waybill is like a bill of lading in that it is evidence of a contract of carriage and is a receipt for the goods carried, but it is not also a negotiable document of title. The waybill cannot be endorsed over to the consignee so as to enable him to claim the goods. Instead the consignee named in the waybill presents himself at the place of delivery and proves his own identity.

Since the waybill is not a document of title, it can be freely reproduced, even electronically, and thus has the advantage of speedy transmission. In fact, its lack of negotiability makes it a safe document which can be handled easily and without fear of theft or loss. Nevertheless, the waybill poses a number of problems:

### Problem I: Application of the Hague Rules

It is conceivable that the waybill is not subject to either the Hague or the Hague/Visby Rules because, by Article

I(b), they only apply to "contracts of carriage covered by a bill of lading or similar document of title." (emphasis added) Yet, it can be argued that waybills may very well be subject to the Hague and the Hague/Visby Rules. Remembering that the Rules are mandatory public policy, by reason of article III(8), the issuance of a non-negotiable receipt, such as a waybill, is only permitted under the very rare circumstances of Article VI:

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

In consequence, it can be strongly urged that the waybills in customary use in certain ordinary commercial trades are subject to the Hague Rules incorporated in COGWA. The mandatory

character of the Rules, in conjunction with the narrow provisions of Article VI, prohibits exemption for normal traffic even by waybill.

When the United Kingdom adopted the Hague/Visby Rules the implementing act made them apply with statutory force to any non-negotiable receipt, such as a waybill, that is so marked and "expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading."<sup>1</sup> The legislation did not clarify the problem in issue, namely whether a waybill lacking a clause paramount is subject to the Rules. The Hamburg Rules would solve the problem by stipulating in Article 2(1) that they will apply "to all contracts of carriage between two different states." This change is a major advantage of the Hamburg Rules over the Hague Rules.

#### Problem II: The Effect of Incorporation of the Hague Rules

As a matter of practice, all waybills incorporate the Hague or the Hague/Visby Rules. However, this incorporation can be less than completely effective because some courts have said that, when the Rules are brought into operation by agreement, they have the same status as any other clause of the contract and the over-riding consequence of Article III(8) is not felt. Thus the U.S. Court of Appeal held in Pannell v. U.S. Lines Co.<sup>2</sup> that where a statute is incorporated by reference, its provisions are merely terms of the contract

evidenced by the bill of lading. Pannell only means, however, that in such circumstances the bill of lading and the Hague Rules must be construed together according to their sense and meaning.<sup>3</sup> The same position was taken by a Canadian court in respect to incorporation of the Hague Rules into bills of lading.<sup>4</sup> Even the House of Lords came to the same conclusion in regard to the incorporation of the Hague Rules into a charter party.<sup>5</sup> No reported case about the incorporation of the Rules into a waybill seems to have arisen yet, but there is no reason to believe the conclusion would be different.

The problem could be solved if the clause incorporating the Rules into the waybill were to stipulate clearly that they shall take precedence over the other clauses. This is what the bill of lading of Overseas Containers Limited would seem to do, although not by specific language. The clause uses the word "warranted":

"This Waybill is deemed to be a contract of carriage as defined in Article 1(b) of the Hague Rules and Hague/Visby Rules, but it is not a document of title to the Goods. The Contract evidenced by this Waybill is subject to the Carrier's standard Bill of Lading terms and conditions and tariff for the relevant trade, copies of which may be obtained from the offices of the Carrier and those of his authorized agents. Except for live animals, and Goods which are stated herein to be carried on deck, these terms and conditions are warranted, in respect of the sea portion of the transit, to apply the Hague Rules or the Hague/Visby Rules, whichever would have been applicable if the Carrier had issued a Bill of Lading instead of this Waybill." (emphasis added)<sup>6</sup>



The General Council of British Shipping (G.C.B.S.) sea waybill is more detailed and explicitly gives precedence to the Hague or the Hague/Visby Rules over the other standard conditions of the carrier. The G.C.B.S. clause reads as follows:

The contract evidenced by this Waybill is subject to the exceptions, limitations, conditions and liberties (including those relating to pre-carriage and on-carriage) set out in the Carrier's Standard Conditions of Carriage applicable to the voyage covered by this Waybill and operative on this date of issue; if the carriage is one where had a Bill of Lading been issued the provisions of the Hague Rules contained in the International Convention for unification of certain rules relating to Bills of Lading dated Brussels, 25th August 1924 as amended by the Protocol signed at Brussels on the 23rd February 1968 (the Hague/Visby Rules) would have been compulsorily applicable under Article X, the said Standard Conditions contained or shall be deemed to contain a Clause giving effect to the Hague/Visby Rules. Otherwise the said Standard Conditions contain or shall be deemed to contain a Clause giving effect to the provisions of the Hague Rules. In neither case shall the proviso to the first sentence of Article V of the Hague Rules or the Hague/Visby Rules apply. The carrier hereby agrees: (i) that to the extent of any inconsistency the said Clause shall prevail over the said Standard Conditions in respect of any period to which the Hague Rules or the Hague/Visby Rules by their terms apply, and (ii) that for the purpose of the terms of this Contract of Carriage this Waybill falls within the definition of Article 1(b) of the Hague Rules and the Hague/Visby Rules.<sup>7</sup>

Of course, the incorporation of the Rules into the waybill would be even stronger if the operative clause were stamped or typed onto the document, but this is not practical.

### Problem III: Taking Suit under a Waybill

Waybills also present problems about the right to take suit. While a shipper may sue upon the contract of carriage, the consignee may only do so by virtue of the Bills of Lading Act.<sup>8</sup> Section 2 of the Canadian Bills of Lading Act reads:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, has and is vested with all such rights of action and is subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Since this legislation only applies to bills of lading, the consignee of goods under a waybill is not necessarily invested with the rights of the shipper. In consequence, the consignee may have difficulty in bringing an action in contract for cargo damage. The carrier may also withhold settlement of a just claim because he is not certain with whom he should settle.

To overcome this uncertainty, Overseas Containers Limited (O.C.L.) has put the following clause in its waybill:

Unless instructed to the contrary by the Shipper, the Carrier will, subject to the aforesaid terms and conditions, process cargo claims with the consignee named in this Waybill. Such settlement, if any, shall be a complete discharge of the Carrier's liability to the Shipper.

The waybill of the General Council of British Shipping

(G.C.B.S.) is different and attempts to go even further. It tries to transfer the benefits of the carriage contract to the consignee, who also purportedly undertakes all the responsibilities of the shipper. The G.C.B.S. waybill reads:

The Consignee by presenting this Waybill and/or requesting delivery of the goods further undertakes all liabilities of the Shipper hereunder, such undertaking being additional and without prejudice to the Shipper's own liability.

The benefits of the contract evidenced by this Waybill shall thereby be transferred to the consignee or other persons presenting this Waybill.

Does the G.C.B.S. waybill give a clear cut right to take suit? One doubts if the issuer of the waybill could contest that right. However, the right to proceed against the ship, the shipowner, or a demise charterer, if not the issuer of the waybill, is doubtful, or at least difficult.

In an attempt to make the stipulations of the shipper binding upon the consignee the O.C.L. and the G.C.B.S. waybills contain the following clause:

The shipper accepts the said Standard Conditions on his own behalf and on behalf of the Consignee and the owner of the goods and warrants that he has authority to do so.

Finally, there is the problem of taking suit in tort or delict.<sup>9</sup> Two recent English judgments on the rights of cargo owners to take suit are especially pertinent to actions for damage to cargo carried under waybills.

In the Elafi Mustill J. (as he then was) notes generally that:<sup>10</sup>

Under English law, the fact that a person has taken delivery from a carrier of damaged goods, in respect of which he has paid the purchase price does not in itself entitle him to pursue an action against the carrier in respect of the damage. Something else must be shown.

Mustill J. believed he was bound by the Wear Breeze.<sup>11</sup> Consequently the only person who can sue in tort in respect of cargo damage, he said;<sup>12</sup>

... is a person who was the owner of the goods, or entitled to possession of them at the time when the tort was committed, that is to say in the case of a claim in negligence at the time when the goods suffered damage.

In the case at hand the cargo was shipped to various claimants under identical bills of lading and the shipments on board were indistinguishable. In consequence ownership did not pass until the cargo was ascertained under the Sale of Goods Act s. 16. This would normally be at discharge when the various lots destined for individual consignees were separated. All the cargo except claimant's cargo was discharged at Hamburg and when the ship arrived at Karlshamms, water entered the ship due to the carrier's fault and the cargo was damaged. On board was claimant's cargo under six bills of lading and extra over-shipped cargo purchased under contract by claimant and for which no bills of lading had been issued.

It was held that it was not necessary to separate and

ascertain individual bill of lading shipments addressed to the same consignee. Thus claimant became owner at Hamburg and could sue in tort for the fault committed later at Karlshamms.

It is interesting that Mustill J. did not believe that there was a right to sue in contract:<sup>13</sup>

Bills of lading which have become by a process of exhaustion, the only remaining documents of title in respect of an undifferentiated bulk do not ipso facto become transformed into documents of title for the whole of the bulk. As regards the balance (not shipped under bills of lading) this would be held by the carriers as bailees for the shippers.

Four months later in Irene's Success,<sup>14</sup> Mr. Justice Lloyd reviewed the previous jurisprudence and held that claimants who were C.I.F. buyers of a cargo of coal but who could not sue in contract because they were never holders of the bill of lading could nevertheless sue in tort even although they were not the owners of the coal when the damage was done.

Lloyd J. relied on Lord Wilberforce's judgment in Annas v. Merton London Borough Council:<sup>15</sup>

First one has to ask whether, as between alleged wrongdoer and the person who has suffered damage there is a sufficient relationship or proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...



Lloyd J. then concluded that there was

... sufficient relationship of proximity between the the plaintiffs as c.i.f. buyers and the defendants as ocean carriers, such that defendants ought reasonably to have contemplated that carelessness on their part in carrying the goods would be likely to cause damage to plaintiffs.<sup>16</sup>

Nor did he see any argument of policy against such a conclusion, thus complying with Lord Wilberforce's second rule:

But if I may express my own tentative view, it would be that it would require a duty of care in the present case, arising out of so close a relationship as that which exists between a carrier and a c.i.f. buyer, to be excluded.<sup>17</sup>

Finally, he refused to follow the Wear Breeze:

For the reasons which I have given, I would hold that if the Wear Breeze were being decided today, it would be decided differently.<sup>18</sup>

#### Problem IV: The Waybill as Evidence of the Goods

Another possible lack of benefit to the consignee by waybill is his inability to rely upon it as evidence of the shipment of the goods. The Bills of Lading Acts<sup>19</sup> permit the consignee to introduce his bill of lading as conclusive evidence in some circumstances. Section 4 of the Canadian Bills of Lading Act reads:



Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of such shipment as against the master or another person signing the bill of lading, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary; but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims.

Since a waybill is outside this legislation, the consignee does not have the benefit of estoppel as to the shipment of the goods granted to a holder of a clean bill of lading.

If waybills are within the application of the Hague Rules, then arguably, by virtue of Article III(4), they do provide "prima facie evidence" of the receipt of the goods by the carrier, but this is not as strong as the "conclusive evidence" of shipment under the Bills of Lading Act. The Visby amendments to the Hague Rules have added a sentence to Article III(4) creating an estoppel analogous to the Bills of Lading Acts. This provision might appear to benefit a consignee under a waybill that incorporates the Hague/Visby Rules, but the British Carriage of Goods Act specifically excludes its application to non-negotiable receipts.<sup>20</sup>

## Problem V: Application of the Himalaya Clause

Waybills regularly contain Himalaya clauses, which limit the liability of stevedores, terminal agents and other subcontractors. The reasoning for holding valid such third party benefits has usually been based on Lord Reid's four rules of agency in Midland Silicones v. Scruttons.<sup>21</sup> Actually there were five rules. Lord Reid's famous dictum is as follows:

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply.

It is the fifth rule, -- "And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act ... apply." -- that causes particular difficulty for waybills. Since waybills are not subject to the Bills of Lading Acts, neither the rights nor the liabilities of the terms of carriage, including any Himalaya clause, are vested in the consignee.<sup>22</sup> Consequently, it is doubtful if the contract between the shipper and the carrier, acting as the agent of stevedores and other cargo handlers, is binding on the consignee.

However, carriers today rely not only on the Himalaya clause but also on circular indemnity clauses which read:

Sub-contracting: .... (2) The Merchant undertakes that no claim ... shall be made against any ... sub-contractor of the carrier which imposed or attempts to impose upon any of them ... any liability whatsoever in connection with the goods and, if any such claim ... should nevertheless be made, to indemnify the Carrier against all consequences thereof ...

Such a clause was upheld in the bill of lading case of The Elbe Maru.<sup>23</sup> The court exercised its discretion to stay the action of the merchant upon the application of the carrier and thus enforced the contractual obligation between them not to sue the subcontractors. Incidentally, the court noted that, although the subcontractors were grossly negligent, their conduct did not constitute a fundamental breach of the carriage agreement so as to prevent the carrier's application to halt the litigation based upon a term of that contract.

#### Problem VI: Identity of the Carrier

The G.C.B.S. sea waybill contains an identity of carrier clause as follows:

Notwithstanding anything contained in the said Standard Conditions, the term Carrier in this Waybill shall mean the Carrier named on the front thereof.

Such a clause, like the demise clause, has been held valid although there are strong arguments to the contrary.<sup>24</sup> The main argument why the demise clause is invalid is that it

is contrary to Article III(8) of the Hague Rules which forbids exculpatory clauses. If the Hague Rules do not apply to waybills,<sup>25</sup> or if they do apply only by incorporation so that they do not take precedence over any other clause of the waybill,<sup>26</sup> the identity of carrier clause may be valid. Then suit could not be taken against the shipowner if it was not named as the carrier on the face of the waybill. The Hamburg Rules would solve the problem by defining carriers and actual carriers in Article 1(1) & (2) and holding them jointly and severally liable under Article 10.

#### Problem VII: Stoppage in Transit

The fact that the waybill is evidence of a contract between the shipper and the carrier provides one of its strengths. Since the shipper controls both the shipment and the waybill during transit, he can redirect carriage of the cargo by instructions to the carrier at any time before delivery to the consignee. Such redirection or stoppage in transit, or the threat of it, is upsetting to the consignee but he can do nothing about it because his is not vested by the Bills of Lading Acts with all the rights of the shipper.<sup>27</sup>

#### Problem VIII: Negotiability

The last important problem concerning waybills arises from their most distinctive characteristic - they are not negotiable. Although this is their raison d'etre, problems are caused when goods are sold in transit, especially when they are

sold many times. Since there is no document that can be endorsed over to a purchaser, ownership is difficult to transfer and then to prove. On the other hand, lack of negotiability prevents considerable fraud.

The O.C.L. waybill tries to take account of transfers of ownership of the goods by providing for delivery instructions from the consignee as follows:

Delivery will be made to the Consignee named, or his authorized agent, on production of proof of identity at the place of delivery. Should the Consignee require delivery elsewhere than at the place of delivery as shown below then written instructions must be given by the Consignee to the Carrier or his agent. Should delivery be required to be made to a party other than that named as Consignee, authorization must be given in writing by the Shipper to the Carrier or his agent.

Waybills are used extensively in the tanker trade where negotiability is feared. New systems of registration of ownership of oil cargoes with banks and bank guarantees are springing up. A universally acceptable system is still in the future, however.

### Conclusion

Waybills are now used very extensively, especially in the container trade. They solve a number of problems but cause others. The Hamburg rules at least apply to waybills and in this respect are an improvement over the Hague Rules. The remaining problems resulting from waybills will have to be



solved by more sophisticated contractual terms in the waybills themselves, by new banking and commercial practices, and perhaps by amendments to the Bills of Lading Acts.

#### References

1. Carriage of Goods by Sea Act 1971, Stats. U.K. 1971, c. 19, s. 1(6)(b).
2. 263 F.2d.497, at 498, [1959] A.M.C. 935, at 936 (2 Cir. 1959); cert. denied 359 U.S. 1013, [1959] A.M.C. 1604 (1959). See also Commonwealth v. Puerto Rico 607 F.2d.322, at 325, [1979] A.M.C. 2772, at 2776 (4 Circ. 1979) where it is said "We find Pannell's reasoning compelling."
3. The point has also been made in a very reasoned judgment in Watermill Export Inc. v. M.V. Ponce 506 F. Supp. 612, [1981] A.M.C. 2457 (S.D.N.Y. 1981).
4. Atlantic Consolidated Foods Ltd. v. The Ship Doroty [1979] 1 F.C. 283, at 293, [1978] E.T.L. 550, at 561; aff'd. [1981] 1 F.C. 783, 35 N.R. 160.
5. Adamastos v. Anglo Saxon Petroleum [1958] 1 Lloyd's Rep. 73. See also W.R. Varnish v. Kleti (1949), 82 Lloyds L.R. 525 where in a shipment from Egypt (where the Hague Rules do not apply) to England, the bill of lading contained a printed clause incorporating the British Carriage of Goods Act as well as a typed "onion" clause. The two clauses were interpreted according to the normal rules of contract construction. Since 1971 in the United Kingdom the incorporation into a waybill of the Hague/Visby Rules is facilitated and strengthened by s. 1(6)(b) of the U.K. Act. See the discussion under Problem I.
6. Excellent discussions on the legalities and effects of waybills including O.C.L. and G.C.B.S. sea waybills are to be found in the papers delivered by J.W. Richardson of O.C.L. and Richard Williams of Ince and Co. at a Lloyd's Publishing Conference in London on March 30, 1979. Other very useful papers were delivered from the viewpoint of a shipper, a banker, an insurer, and an expert on documentation. Mr. Williams' paper was published in [1979] Lloyd's Mar. and Com. L.Q. 297.



7. The G.C.B.S. sea waybill is only intended for breakbulk port-to-port operations, unlike the O.C.L. waybill which may be used for containerized combined transport.
8. R.S.C. 1970, c. B-6. Similar legislation has been enacted by the Provinces and in Britain in the Bills of Lading Act, Stats. U.K. 1885, c. 111, and in the United States in the Pomerene Act, 49 U.S. Code 102. In air traffic the Warsaw Convention (1929) articles 12-14 solve the problem by specifically giving the consignee and the consignor the right to take suit.
9. For an example of an unsatisfactory situation see Cour d'Appel d'Aix le 2 juin 1978, D.M.F. 1979, 527.
10. Karlshamms Olje v. Eastport Nav. Co. [1981] 2 Lloyd's Rep. 679, at p. 682.
11. Margarine Union G.m.b.H. v. Cambray Prince SS Co. [1967] 2 Lloyd's Rep. 315, [1969] 1 Q.B. 219.
12. Supra, n. 10, at p. 682.
13. Ibid., at pp. 686-687.
14. Sckiffahrt-Und Kohlen G.m.b.H. v. Chelsea Maritime Ltd. [1981] 2 Lloyd's Rep. 635.
15. [1978] A.C. 728, at p. 751.
16. Supra, n. 14, at p. 636.
17. Ibid., at p. 637.
18. Ibid., at p. 639.
19. Supra n.8.
20. Carriage of Goods by Sea Act 1971, Stats. U.K. 1971, c. 19, s. 1(6).
21. [1961] 2 Lloyd's Rep. 365, at p. 374.
22. See section 2 of the Canadian Bills of Lading Act discussed supra under Problem III.
23. [1978] 1 Lloyd's Rep. 206 (Q.B.).
24. See W. Tetley, Marine Cargo Claims (2 ed. 1978) at pp. 88-96 and Canadian Klockner v. D/S A/S Flint [1973] F.C.

988.

25. See discussion under Problem I.

26. See discussion under Problem II.

27. See section 2 of the Canadian Bills of Lading Act  
discussed supra under Problem III.

APPENDIX C    CONSTITUTIONAL JURISDICTION OVER THE WATER CARRIAGE  
OF GOODS

Carriage of goods by water is relatively unaffected by jurisdictional problems between the Federal and Provincial governments. The British North America Act gives to the Federal Government the exclusive legislative authority over "navigation and shipping" as well as "the regulation of trade and commerce".<sup>1</sup>

Constitutional problems arise in carriage of goods by water when the damage occurs before loading or after discharge in a province. Suits for damage ashore have been taken in the Federal Court of Canada, and in provincial Supreme Courts where provincial law has been applied. The Federal Court Act gives jurisdiction to that Court over "Canadian maritime law" and, in particular, "claims in respect of stevedoring".<sup>2</sup> The meaning to be attached to "Canadian maritime law" is unclear and has been part of the entire uncertainty that currently exists about the jurisdiction of the Federal Court.<sup>3</sup>

The critical question of whether "navigation and shipping" gives the Federal Government legislative competence as regards carriage of goods by water where the incident that causes damage occurs in a province has never been addressed. The Federal Government has assumed this legislative competence in passing the Hague Rules in COGWA and the before-loading and

after-discharge sections of the Canada Shipping Act. Court opinion has been that "shipping" should be construed broadly,<sup>4</sup> but uncertainty remains. It could be argued that the occurrence of damage before loading or after discharge would be incidental to the international or the inter-provincial carriage, which, therefore, permits federal law to apply. The question will need to be concluded in the context of resolving the whole constitutional uncertainty about jurisdiction over Canadian maritime law.

#### References

1. 30 and 31 Vict., c. 3, as amended, s. 91 (2) and (10).
2. R.S.C. 1970, (2nd supp.), c. 10, as amended, s. 22.
3. See: McNamara Construction (Western) Ltd. et. al. v. The Queen. [1977] 2 S.C.R. 654; Tropwood et. al. v. Sivaco Wire and Nail Co. et. al. [1979] 2 S.C.R. 157; Antares Shipping Corp. v. The Ship "Capricorn" et. al. [1980] 1 S.C.R. 553; and J.M. Evans, "Federal Jurisdiction -- A Lamentable Situation" (1981), 59 Canadian Bar Rev. 124.
4. Albert S. Abel and John I. Laskin, Laskin's Canadian Constitutional Law (4th ed.) (Toronto: The Carswell Company Ltd., 1975), at pp. 498-499.

#### APPENDIX D   DELIVERY PROVISIONS OF THE CANADA SHIPPING ACT

Carriage problems that arise after discharge of the cargo have already been discussed at Chapter II.B.4. The report points out the uncertainties that will continue about the responsibility for delivery whether the Hague Rules or the Hamburg Rules are applied. This appendix addresses the question how adequate provisions should be made in Canadian law. Specifically, should the delivery provisions of the Canada Shipping Act be revised in the context of the new Maritime Code or in a reformed COGWA? This appendix is a reprint of an interim report done at the request of the Department of Transport in June 1981. Our opinions are unchanged.

Delivery of Goods  
Maritime Code or COGWA

Recommendation by the Dalhousie Ocean Studies Programme

18 June 1981

The Canada Shipping Act has already been identified in our projected table of contents for the COGWA Review as one of a number of related topics for consideration. The Act raises several matters of concern to cargoes, as opposed purely to shipping, and consequently impacts with COGWA. This memorandum is a preliminary comment in response to the interim enquiry from DOT on delivery of goods in particular.

The Present Provisions of the Canada Shipping Act

The specific question is whether it would be appropriate to deal with delivery of goods in a revised COGWA rather than in the new Maritime Code. The reference to "delivery of goods" is to the Canada Shipping Act ss. 666-674. These sections by no means encompass all the law affecting discharge and delivery of cargo: much of it exists at Common Law. Sections 666-674 appear to have been modelled directly on the U.K. Merchant Shipping Act, 1895, ss. 492-501. They deal with two distinct matters - delivery of goods and liens for freight.

In outline, section 666 permits a shipowner to discharge cargo where the consignee has not taken delivery in a reasonable



time. The reason for the consignee's inability or unwillingness to receive goods is immaterial to the application of this section (Carver, 12 ed. para 1032). The shipowner must deliver the goods to a wharf or warehouse. This discharge of cargo appears to terminate the shipowner's responsibility for the safety of the goods, (Carver, para. 1038; Payne & Ivamy, 10 ed. p. 135), but what, if any, further responsibilities he may continue to bear, or which the warehouseman may then incur, for delivery to the consignee is unclear in the Act and is still unsettled. Furthermore, the statutory distribution of responsibilities may also occasion difficulties with contractual obligations about demurrage (Scrutton, 18 ed. art. 150).

The reasonable time within which the consignee must accept delivery of the goods is either the time established in the agreement, bill of lading, or charter party, or within seventy-two hours of the report of the vessel. A shipowner's notice of readiness to unload is not required at Common Law (Payne & Ivamy p. 128). However, where the consignee is ready to take delivery elsewhere than the ship is discharging, section 666(5) requires the shipowner to give twenty-four hours notice in writing of his readiness to deliver the goods. Even so, failure to give this notice does not relieve the consignee of the duty to take delivery within a reasonable time after he knows he can have the goods (Carver para. 1035). These provisions obviously only partially deal with timeliness at discharge. Modern ocean traffic conditions may require rather

fuller statutory regulation for efficient trading.

In any event, section 666 may not bind the shipowner. In the face of different arrangements between the parties to the carriage contract, either by agreement or by a custom of the port, the statute will not prevail (Carver para. 1036). Indeed, shipowners very frequently demand that consignees take delivery at the moment of discharge of the cargo over the ship's rail and that all their responsibilities for the goods cease from that moment, e.g., the London Clause. Such non-responsibility clauses have been enforced in Canada (Tetley p. 283). What, if any, rights either an innocent or a defaulting consignee may then have are wholly and unhelpfully outside the statutory provisions.

Sections 667-674 regulate a shipowner's lien for freight and other charges on the landing of cargo. The statute provides a method for the shipowner to enforce his lien even though the goods have left his possession and are now in the hands of a warehouseman. By giving written notice on landing the goods under 667, the shipowner may protect his lien through the warehouseman. Sections 668-674 distribute the rights and responsibilities between the shipowner and the warehouseman as to the goods, or a deposit by their owner against them, in payment of his lien and his storage charges respectively. The Act does not create the shipowner's lien: it arises and is otherwise governed by common law. Nor is it clear whether the

statutory enforcement procedures apply only to those goods discharged in conformance with s. 666 (Stanton, vol. 1, 1976, p. 200). Further, the wording of the provisions clouds the scope of liability of the warehouseman for misperformance of his statutory responsibilities to the shipowner.

These are the main aspects of the delivery provisions in the Canada Shipping Act. It is evident they are full of uncertainty and far from being a complete code.

#### The Provisions of COGWA

COGWA is an act designed to apply the Hague Rules in Canadian law and does not deal with any subjects beyond them. There are many commercial problems in ocean transportation that are quite outside the Hague Rules and thus of COGWA. This narrow approach in COGWA reflects the model of the U.K. Carriage of Goods by Sea Act, 1924. The content of COGWA is an exclusive and mandatory set of internationally uniform rules to distribute the responsibilities for sea-going transportation. They operate on the bill of lading between the shipowner and the cargo owner so as to share out both the commercial and shipping risks to both parties.

The Hague Rules, which appear as a schedule to the implementing act, apply to the relations between the shipowner, the shipper, and the consignee from the time when the goods are loaded on to the time they are discharged (Art. I(e)). The meaning of

"discharge", as also of "Delivery" in Act III(6), is undefined and has received much interpretation by the courts and in commercial practice. The Visby Amendments do not affect these terms in the Hague Rules. Apart from these uncertainties, it is apparent that the delivery provisions of the Canada Shipping Act substantially apply to the consignee's goods only after their discharge, i.e., after the Rules in COGWA are spent.

Under the Hamburg Rules, which might be implemented in a revised COGWA, the carrier's responsibility extends until the moment when the goods are delivered. Art. 4(2)(b) expressly deals with "cases where the consignee does not receive the goods from the carrier" by requiring delivery:

... by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge.  
(emphasis added)

Thus it appears that the Hamburg Rules anticipate the situation described in the Canada Shipping Act s. 666, although this result may not have been the one envisioned (L. Peyrefitte, "The Period of Maritime Transport" in Mankabady p. 134).

#### Reasons For and Against Moving the Delivery Provisions

The reason suggested by DOT for the removal of the delivery provisions to a revised COGWA is that their subject matter is entirely commercial and has nothing to do with the carrying

ship as such. There is an implied premise to this reason that COGWA concerns commercial incidents only and the Canada Shipping Act affects ships exclusively. We doubt the clarity of these distinctions.

Legislative enactments should exhibit discernable policy and cohesiveness. COGWA does in a limited way as the implementing vehicle for the Hague Rules. It does not pretend to be a code of carriage law. The Canada Shipping Act also shows cohesion but in a sweeping way as the catch-all of shipping law generally. The Maritime Code, as its very name suggests, will pursue the same end with, hopefully, greater success.

To include any of the delivery provisions in COGWA would require a considerable broadening of its scope, quite out of its present character. The same effect, though to a lesser extent, would be felt on a COGWA revised to incorporate the Hamburg Rules. The range of (in) compatibility between COGWA and the Canada Shipping Act may be judged from these comparative tables:

s. 666

- i) deals with conditions of delivery,
- ii) applies between shipowner and cargo owner,
- iii) applies to goods arriving in Canada,
- iv) is not dependent on the existence of a bill of lading, charter party or other agreement,

v) is commercial in nature.

COGWA

- i) operates only until discharge, though the Hamburg Rules will include delivery,
- ii) applies between shipowner and cargo owner,
- iii) applies only to outward traffic, though the Hamburg Rules may extend to goods arriving,
- iv) deals only with bills of lading and similar documents, but not charter parties,
- v) regulates both commercial and shipping matters.

ss. 667-674

- i) deal with liens on goods for freight and other charges,
- ii) apply between shipowner, cargo owner and warehouseman,
- iii) apply to goods arrived in Canada,
- iv) are not dependent on the existence of a bill of lading, charter party or other agreement,
- v) are commercial in nature.

COGWA

- i) does not deal with liens at all,
- ii) applies between shipowner and cargo owner, but not to third parties such as warehousemen,
- iii) applies only to outward traffic, though the Hamburg Rules now extend to goods arriving,



- iv) deals only with bills of lading and similar documents, but not charter parties,
- v) regulates both commercial and shipping matters.

It is evident that the delivery provisions of the Canada Shipping Act would not fit well in COGWA, even if revised to accomodate the Hamburg Rules. COGWA is well known as the instrument that effects the international rules of carriage. There is nothing to be gained by loading it with extraneous domestic rules of commerce. The apparent attraction of individual codes of carriage and of shipping law only encourages a futile search. The Hague and Hamburg Rules both show that the interests of shipowner and cargo owner are too interdependant to be separated. Even if the delivery provisions were translated to COGWA, cargo owners would still need to refer to the Canada Shipping Act for any number of ship-centered matters, such as dangerous goods (ss. 450-451), wrecks (ss. 500-513), salvage (ss. 515-530), port wardens' surveys of cargo (ss. 609-634), collisions (ss. 638-646), limitation of liability (ss. 647-655), and loading and care of goods (ss. 656-60). Finally, a great part of the law affecting cargoes lies outside both acts altogether.

For these reasons we recommend against moving the delivery provisions into COGWA in any form. We hope that the new Maritime Code will contain better provisions on delivery, which will interact more easily with related law, including COGWA.

APPENDIX E    TABLE OF LIMITS OF LIABILITY UNDER THE RULES

	<u>Stated Units of Account</u>		<u>Canadian Dollar Equivalent<sup>1</sup></u>	
	Per Package	Per Kilo	Per Package	Per Kilo
Hague Rules	\$500 Can.	-	500	-
1977 Gold Clause Agreement	400 Ster.	-	900	-
Hague/Visby Rules	10,000 francs	30 francs	995	3
1979 Protocol to Hague/Visby Rules	667 SDRs	2 SDRs	1,000	3
Hamburg Rules	835 SDRs	2.5 SDRs	1,250	3.75
Multimodal Convention	920 SDRs	2.75 SDRs	1,380	4.12

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 NOTE: 1. Roughly estimated per Chapter III.G, paragraphs 14,  
 26 and 27.

APPENDIX F COMPARATIVE TABLE OF LIMITS OF LIABILITY BY COUNTRY

HAGUE RULES  
(1924)

HAGUE/VISBY RULES  
(1968)

| <u>Country</u> | <u>Date</u>                            | <u>Per Package</u>         | <u>U.S.<br/>(approx.)<br/>\$</u> | <u>Date</u>   | <u>Per Package</u>                                                                              | <u>U.S.<br/>(approx.)<br/>\$</u> |
|----------------|----------------------------------------|----------------------------|----------------------------------|---------------|-------------------------------------------------------------------------------------------------|----------------------------------|
| Australia      | 1924<br>(Sea-carriage<br>of goods Act) | \$200                      | \$230                            | Never adopted | - -                                                                                             | - -                              |
| Belgium        | Nov. 28, 1928                          | 17,500<br>(belgian francs) | \$425                            | Dec. 6, 1978  | 10 000 pgf or<br>about 33,170 B.Fr.<br>(per package)<br>30 pgf or about<br>100 B.Fr. (per kilo) | \$1,000<br>3                     |
| Bulgaria       | (no reply)                             |                            |                                  |               |                                                                                                 |                                  |
| Brazil         | Never adopted                          | - -                        | - -                              | Never adopted | - -                                                                                             | - -                              |
| Canada         | 1936                                   | \$500<br>Canadian          | \$415                            | Never adopted | - -                                                                                             | - -                              |
| Chile          | Never adopted                          | - -                        | - -                              | Never adopted | - -                                                                                             | - -                              |
| China          | Never adopted                          | RMBY700                    | \$490                            | Never adopted | - -                                                                                             | - -                              |
| Columbia       | Never adopted                          | - -                        | - -                              | Never adopted | - -                                                                                             | - -                              |

HAGUE RULES  
(1924)

HAGUE/VISBY RULES  
(1968)

| <u>Country</u>                | <u>Date</u>                                                                       | <u>Per Package</u> | <u>U. S.<br/>(approx.)<br/>\$</u> | <u>Date</u>                                                          | <u>Per Package</u>                                                                  | <u>U. S.<br/>(approx.)<br/>\$</u> |
|-------------------------------|-----------------------------------------------------------------------------------|--------------------|-----------------------------------|----------------------------------------------------------------------|-------------------------------------------------------------------------------------|-----------------------------------|
| Denmark                       | May 7, 1937                                                                       | 1,800              | \$259                             | June 1, 1974<br>and Ec. 13,<br>1978                                  | 10 000 pgf or<br>or 666.5 SDR (per<br>package) or<br>30 pgf. or 2 SDR<br>(per kilo) | \$ 765.00<br><br>2.30             |
| Finland                       | Adopted 1939<br>Came into force<br>in 1940                                        | 600<br>Finnish     | \$134                             | May 1, 1981                                                          | 10 000 pgf or<br>666.5 SDR (per<br>package) or<br>30 pgf or 2 SDR<br>(per kilo)     | 765.00<br><br>2.30                |
| France                        | Hague Rules 1926<br>replaced by Visby<br>in 1979<br>Internally -<br>June 18, 1966 |                    |                                   | Law of Dec. 21,<br>1979<br>No. 79-1103<br>or<br>11 Fr.<br>(per kilo) | 3,700 Fr.<br>(per package)                                                          | 740.00<br><br>2.20                |
| Federal German<br>Republic    | August 10, 1937                                                                   | 1,250 D.M.         | \$520                             | - -                                                                  | - -                                                                                 | - -                               |
| German Democratic<br>Republic | (no reply)                                                                        |                    |                                   |                                                                      |                                                                                     |                                   |
| Ireland                       | Merchant Shipping<br>Act 1947                                                     | £100 Irish         | \$160                             | - -                                                                  | - -                                                                                 | - -                               |

| <u>Country</u> | <u>HAGUE RULES</u><br>(1924)                                                              |                             | <u>HAGUE/VISBY RULES</u><br>(1968)                                                      |                                             |                                                        | <u>U.S.</u><br>(approx.)<br>\$ | <u>Per Package</u> | <u>U.S.</u><br>(approx.)<br>\$ |
|----------------|-------------------------------------------------------------------------------------------|-----------------------------|-----------------------------------------------------------------------------------------|---------------------------------------------|--------------------------------------------------------|--------------------------------|--------------------|--------------------------------|
|                | <u>Date</u>                                                                               | <u>Per Package</u>          | <u>U.S.</u><br>(approx.)<br>\$                                                          | <u>Date</u>                                 |                                                        |                                |                    |                                |
| Italy          | July 19, 1929                                                                             | L 100<br>(Gold, 7.32 grams) | \$200 to \$3,000                                                                        | - -                                         | - -                                                    | - -                            | - -                | - -                            |
|                | (Oct. 7, 1938<br>instrument of<br>ratification<br>deposited)                              |                             | depending on<br>the interpre-<br>tation of £100<br>sterling and<br>the price of<br>gold |                                             |                                                        |                                |                    |                                |
| Japan          | June 13, 1957                                                                             | 100,000 Y.                  | \$455                                                                                   | - -                                         | - -                                                    | - -                            | - -                | - -                            |
| Liberia        | 1949<br>(Liberian<br>Maritime Law,<br>1949, ss. 130-140)<br>(modeled after<br>U.S. Cogsa) | U.S. \$500                  | \$500                                                                                   | - -                                         | - -                                                    | - -                            | - -                | - -                            |
| Mexico         | - -                                                                                       | - -                         | - -                                                                                     | - -                                         | - -                                                    | - -                            | - -                | - -                            |
| Netherlands    | Aug. 15, 1956<br>(part of Dutch<br>Commercial Code)                                       | 1250 fls<br>(Dutch florins) | \$500                                                                                   | March 11, 1981<br>(but not yet<br>in force) | 2000 fls<br>(per package)<br>or<br>6 fls<br>(per kilo) | - -                            | - -                | \$800                          |



HAGUE RULES  
(1924)

HAGUE/VISBY RULES  
(1968)

| <u>Country</u> | <u>Date</u>                                                                                                                                                                      | <u>Per Package</u>                      | <u>U.S.<br/>(approx.)<br/>\$</u> | <u>Date</u>  | <u>Per Package</u>                                                                                 | <u>U.S.<br/>(approx.)<br/>\$</u> |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|----------------------------------|--------------|----------------------------------------------------------------------------------------------------|----------------------------------|
| New Zealand    | 1940<br>(Sea Carriage<br>of Goods Act)                                                                                                                                           | N.Z. \$200                              | approx. 170.                     | - -          | - -                                                                                                | - -                              |
| Nigeria        | 1931<br>Carriage of Goods<br>by Sea Act                                                                                                                                          |                                         |                                  | - -          | - -                                                                                                | - -                              |
| Norway         | 4 Feb. 1938<br>only applicable<br>when demanded by<br>the international<br>obligations of<br>Norway towards<br>states having<br>taken the 1924<br>convention but<br>not the 1968 | 1800 K.<br>(Norwegian<br>Kroner)        | \$313                            | June 8, 1973 | 10 000 pgf or<br>667 SDR or as on<br>12.14.1981<br>NOK 4477.79 (per<br>package) 30 pgf<br>or 2 SDR | \$ 768.33<br><br>2.84            |
| Panama         | No                                                                                                                                                                               |                                         | No                               |              |                                                                                                    |                                  |
| Peru           | Oct. 16, 1964                                                                                                                                                                    | L 100                                   | \$220                            | - -          | - -                                                                                                | - -                              |
| Philippines    | April 22, 1936                                                                                                                                                                   | \$500 U.S.<br>or its peso<br>equivalent | \$500                            | - -          | - -                                                                                                | - -                              |

HAGUE RULES  
(1924)

HAGUE/VISBY RULES  
(1968)

| Country      | Date                                                                        | Per Package          | U.S.<br>(approx.)<br>\$ | Date          | Per Package                                                                                                        | U.S.<br>(approx.)<br>\$      |
|--------------|-----------------------------------------------------------------------------|----------------------|-------------------------|---------------|--------------------------------------------------------------------------------------------------------------------|------------------------------|
| Poland       | Dec. 1, 1961                                                                |                      |                         | May 1980      |                                                                                                                    |                              |
| Portugal     | Feb. 1, 1950                                                                | 12,500 (Escudos)     |                         |               |                                                                                                                    |                              |
| South Africa | June 27, 1951<br>(Merchant Shipping<br>Act 1951 took effect<br>1 Jan. 1960) | R. 200               | \$172                   | -             | -                                                                                                                  | -                            |
| Spain        | July 31, 1930<br>(only in force<br>by 1950)                                 | \$5,000              | \$55                    | -             | -                                                                                                                  | -                            |
| Sweden       | Act of June 5,<br>1936 (1936:277)<br>(Swedish Kroner)                       | 1800 Kr.             | \$350                   | Jan. 1, 1976  | 10 000 pgf<br>(per package) or<br>666.67 SDR or<br>3885 Kroner<br>30 pgf (per kilo)<br>or 2 SDR or<br>11.65 Kroner | \$777.00<br><br><br><br>2.33 |
| Switzerland  | 1954                                                                        | Swiss francs<br>2000 | \$950                   | Dec. 12, 1975 | 2000 Sw. Fr.<br>per package<br>6 Sw. Fr.<br>per kilo                                                               | \$950<br><br><br>2.85        |

| Country    | HAGUE RULES<br>(1924)                     |              | HAGUE/VISBY RULES<br>(1968) |      |                                                 |
|------------|-------------------------------------------|--------------|-----------------------------|------|-------------------------------------------------|
|            | Date                                      | Per Package  | U.S.<br>(approx.)<br>\$     | Date | Per Package                                     |
| U.K.       | 1924<br>amended by<br>Visby 1977          | - -          | - -                         | 1977 | 10 000 pgf<br>per package<br>30 pgf<br>per kilo |
| U.S.A.     | 1936/<br>Carriage of<br>Goods by Sea Act) | \$500        | \$500                       | - -  | - -                                             |
| U.S.S.R.   | Adopted                                   | 250 rubles   | \$360                       | - -  | - -                                             |
| Venezuela  | Not adopted                               | - -          | - -                         | - -  | - -                                             |
| Yugoslavia | 1977                                      | 4,000 Dinars | \$125                       | - -  | - -                                             |

U.S.  
(approx.)  
\$



APPENDIX G COMPARATIVE SURVEY OF NATIONAL ATTITUDES TO THE  
CHOICE OF RULES

Australia is considering the whole question of carriage of goods by sea and "is likely to accept the Hamburg Rules and appropriate legislation. Consideration is also being given to the Multimodal Convention of 1980".

Belgium adopted the Hague/Visby Rules of 1968 on December 6, 1978 but they have not been incorporated as yet into Belgian domestic law by the amendment of article 91 of the Maritime Code. Thus the Hague/Visby Rules apply internationally while the Hague Rules apply internally, but it must be remembered that Belgium has virtually no internal sea traffic. It is possible that the Hamburg Rules will be adopted if other European nations do. It is impossible to predict if the Multimodal Convention will be adopted. Belgium has not adopted SDRs in respect to the Hague/Visby Rules.

Brazil has not entered into the Hague Rules and so the adoption of the Hague/Visby and the Hamburg Rules is not likely in the foreseeable future, while the "Multimodal Convention contains very controversial aspects". Carriers usually stipulate U.S. \$500 per package in their bills of lading.

Chile has not adopted the Hague Rules and relies on its traditional commercial code. Nevertheless, when Chile does act it is likely to include the Hamburg Rules by amendment into the

Commercial Code. Presently carriers voluntarily incorporate the Hague Rules into their bills of lading and usually apply the U.S. \$500 per package limitation as well.

People's Republic of China "We have not yet acceded to the Hague Rules, the Visby Rules, the Hamburg Rules or the Multimodal Convention 1981, and we do not have any legislation in this respect in China. We are sure, however, that the relevant organizations in this country will study those Conventions and make a decision. At present, some of the provisions in the Hague Rules have been adopted into the conduct of ocean shipping business in this country. For instance, the bill of lading of the China National Foreign Trade Transportation Corporation expressly provides: "Clause 4 Hague Rules: This Bill of Lading shall have effect in respect of Carrier's liabilities, responsibilities, rights and immunities subject to the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924." Clause 11 of the Bill of Lading provides: "Notwithstanding Clause 4 of this Bill of Lading the limitation of liability under the Hague Rules, the amount of compensation shall be deemed to be RMB ¥700 per package or unit". Another instance is the Bill of Lading of China Ocean Company. Although it does not expressly refer to the Hague Rules, the provisions of the Carrier's liabilities, responsibilities, rights and immunities are in fact in conformity with those in the Hague Rules. The amount of



compensation is also RMB Y700.

Columbia has adopted neither the Hague nor the Hague/Visby Rules. It is studying the Hamburg Rules and would probably act in concert with other South American nations.

Denmark has ratified the Brussels Convention of August 25, 1924 (the Hague Rules). It was introduced into Danish law by Act No. 150 of May, 1937 (konnossementsloven) and came into force on January 1, 1939. Denmark has also ratified the Brussels Protocol of February 23, 1968, without however, denouncing the Convention of 1924. The Convention of 1924 as amended by the Protocol of 1968 (the Hague/Visby Rules) has been introduced into Danish law as a part of the Maritime Code (Sloven). It came into force for transport within and between Denmark, Norway and Sweden on July 1, 1974, and also for Finland on October 1, 1975. From June 23, 1977, it came into force in accordance with its general rules of scope of application.

The Hague Rules apply if the bill of lading is issued in a State party only to the Hague Rules. The Hague/Visby Rules apply in the cases mentioned in article 5 of the Protocol of 1968. In addition, they apply to carriage under a bill of lading issued in a State, party neither to the Hague Rules nor to the Hague/Visby Rules if the carriage is to Denmark, Finland, Norway or Sweden. And, finally, they apply to all carriage, whether under a bill of lading or not, within or between the four countries just mentioned.

The unit limitation in the Hague Rules is 1800 Danish Kroner. In the Hague/Visby Rules it is 10,000 Poincaré francs per package and 30 Poincaré francs per kilo in accordance with article 2 of the Protocol of 1968. This corresponds at present to about 5,000 Danish Kroner and 15 Danish Kroner, respectively. By Danish law, conversion from Poincaré francs to Danish Kroner takes place according to the value of the day of payment.

Denmark has signed the protocol of 1979 which would convert the 10,000 francs and the 30 pgf in the Hague/Visby Rules to SDRs. This 1979 Protocol has not come into effect. However as of 1st April 1979, 30 francs corresponds to 2 SDRs and 10,000 francs to 667 SDRs. One SDR corresponds to about 8.35 Kroner. One U.S. dollar corresponds to about 7 Danish Kroner.

It follows from the ratification of the Hague/Visby Rules that the Himalaya Clause is part of Danish Law. To the extent that, in any individual case, the stevedore or other similar party is regarded as a servant or agent of the carrier, he may also avail himself of the defences and limits of liability of the carrier under Danish law.

Jurisdiction clauses and arbitration clauses are valid if general conditions for the valid conclusion of contracts are fulfilled. In general, the demise clause is not valid. Only in case of transshipment or substitution, which has been agreed upon beforehand may the carrier contract out of his liability

for loss or damage occurring during the period in which the goods are in care of another carrier. The carrier may contract out of his liability for the period before loading and after discharge.

It is difficult to say if Denmark will adopt the Hamburg Rules or the Multimodal Convention.

Finland ratified and adopted the Hague Rules in 1939. They came into force on the 1st January, 1940. The per package limitation is 600 Finnish marks. The Hague/Visby Rules have not been ratified by Finland but have been incorporated into the Finnish Maritime Code and apply to inter-Scandinavian trade and to some other trades. Adoption of both the Hamburg Rules and the Multimodal Convention is unlikely.

Poincaré gold francs have been replaced by SDRs by an amendment to the Finnish Maritime Code, which came into force on the 1st May, 1981. The equivalent to 10,000 francs is 666.67 SDRs and to 30 francs is 2 SDRs.

France adopted the Hague Rules in 1936 for international trade and by the law of June 18, 1966 for internal carriage. Law number 79-1103 of December 21, 1979 adopted the terms of the Hague/Visby Rules. It is possible France will adopt both the Hamburg Rules and the Multimodal Convention. France has not yet converted to SDRs for the Hague/Visby Rules but this should not be delayed long.

The Federal Republic of Germany adopted the Hague Rules in 1937. The adoption of the limitation sum and the container clause of the Hague/Visby Rules is likely in 1982. Despite the negative reaction of industry, ratification of the Hamburg Rules is likely in one or two years if other shipping countries do the same. The Multimodal Convention is not likely to be adopted.

Ireland adopted the Hague Rules in 1937 but, despite pressure from industry, has not changed to the Hague/Visby Rules. It is unlikely that the Hamburg Rules or the Multimodal Convention will be adopted.

Israel adopted the Hague Rules on December 1, 1926 by the Carriage of Goods by Sea Ordinance. No decision has been taken on the Hague/Visby Rules, the Hamburg Rules or the Multimodal Convention.

Italy put the Hague Rules into effect in 1938 and the per package limitation is £100 sterling. Some interpretations put this at 7.32 grams of gold or about U.S. \$3,000. Other interpretations put this at the U.S. equivalent of 100 or about U.S. \$200. It is difficult to predict if Italy will adopt the Hague/Visby or Hamburg Rules or the Multimodal Convention.

Japan adopted the Hague Rules in 1957. The Hague/Visby Rules have been studied but are unlikely to be adopted in the near future. The Hamburg Rules are being studied but "there is no

possibility of their adoption in the near future."

Liberia has historically followed the American legislation, nevertheless "it is proposed to ratify Hague/Visby during 1981-82." There is no present interest in the Hamburg Rules or the Multimodal Convention from Liberia's standpoint.

Mexico has not adopted the Hague Rules. The Hamburg Rules are being studied but there are many doubts about them. As to the Multimodal Convention, Mexico is already a signatory and will ratify it in the near future.

Netherlands The Hague Rules were adopted in 1956 and are in force today. The Hague/Visby Rules were adopted in 1981 but are not yet in force. The Hamburg Rules and the Multimodal Convention are being studied.

The Dutch Commercial Code (Article 740d), as far as dealing with the limited liability of owners of sea going vessels, was recently amended in such a way that the equivalent of a Poincaré franc is not 1/15 SDR. Shortly before this amendment the Supreme Court decided that Poincare francs and Germinal francs have to be converted into Dutch currency at the rate of:

1 Poincaré franc = 1/15 SDR

1 Germinal franc = 1/3 SDR

The value of the SDR varies slightly each day, as it is an average of various international currencies. On 25 November 1981 its value was Dfl. 2.855.

New Zealand adopted the Hague Rules in 1940. The Hamburg Rules are being studied but are not likely to be adopted. It is possible that the Multimodal Convention will be adopted but not for two or three years.

Norway adopted the Hague Rules in 1938 and the Hague/Visby Rules in 1973. By Order-in-Council May 12, 1978 1 SDR shall equal at Poincaré francs. The amounts in SDR under the amended Section 326 of the Maritime Code shall be converted into Norwegian currency according to the value of SDR on the day upon which payment is made. The Hamburg Rules are being studied and on balance are likely to be adopted. No study has been commenced of the Multimodal Convention.

Panama has not adopted the Hague Rules. Since the posture of Panama in respect to International Conventions on the carriage of goods by sea is affected by sui generis historical and geographical factors, it is necessary to set forth the historical and legislative background.

Since 1903, when the Canal Zone was created under the jurisdiction of the United States the two and, until recently, only deep water ports in Panama, at the Canal terminal cities of Balboa and Cristobal, were under such jurisdiction. There was a United States District Court for the District of the Canal Zone, but it could no longer accept civil and maritime cases after September 30, 1979, and is due to be closed on March 31, 1982. Maritime cases arising from the carriage of



goods to the ports of Balboa and Cristobal, which served as ports of entry to the entire Isthmus of Panama, were litigated in the District Court of the Canal Zone. Panama, therefore, has no maritime jurisprudence of any significance, nor has there been any need for the adoption of legislation concerning the carriage of goods by sea.

The Commercial Code of Panama contains the substantive maritime law of this country. Articles 1246 to 1262 thereof deal with Bills of Lading. The only section of significance to the question of carriers' liability, and only indirectly, is 1250, which states that the text of the bill of lading, if in legal form, shall be valid evidence as between the parties to the contract, as to each other and between their insurers, without prejudice to them or to shipowners to produce evidence to contradict the terms and conditions appearing in the said text.

Since the entry into effect of the new Panama Canal Treaties in October 1, 1979, and the reversion of the ports of Balboa and Cristobal to Panamanian jurisdiction, the need for Panamanian legislation and/or the adoption of international conventions for the carriage of goods by sea has become necessary. It is expected that in time the need will produce results.

Peru adopted the Hague Rules in 1964 and a committee has recommended the adoption of the Hague/Visby Rules, 1968. The same committee recommended that the Hamburg Rules 1978 not be

adopted. The Government regulation implementing the Hague Rules has not expressed the per package limitation in terms of Peruvian currency. Therefore the meaning of the provision stating that the shipowner's maximum liability shall be £100 sterling per package or unit is puzzling. In practice many claims have been settled by payment of £100 sterling in legal currency of the United Kingdom although claimants are every day more reluctant to accept such a limitation. On the other hand some claimants relying on normal conflict of laws rules under Peruvian legislation only accept the per package limitation expressed in the national laws giving statutory effect to the Hague or the Hague/Visby Rules as the case may be in the countries where the bills of lading were issued.

Philippines adopted the Hague Rules by Commonwealth Act No. 65 on April 22, 1936 when the Philippines were still under a commonwealth government. The Hamburg Rules 1978 are being studied and it is hoped that the Multimodal Convention 1980 will be studied.

Poland The independent status of Poland was restored in 1918 after the partition of Poland in the second half of the eighteenth century. In the domain of commercial maritime law the provisions contained in Book IV of the German Commercial Code of 1897 were maintained in force until the elaboration of a new, national and modern maritime law which came into force in 1961. In the meantime, i.e., in 1936, Poland ratified the

Brussels Convention of 1924 for the unification of certain rules relating to bills of lading (Law Gazette of 1937 No. 33 item 258) which suitably amended the law of that time. The Maritime Code Act of 1st December 1961 (published in the Law Gazette of the People's Republic of Poland, dated 15th December 1961 No. 58, item 318) has superseded provisions contained in Book IV of the German Commercial Code of 1897. The Polish Maritime Code Act 1961 entered into force after a lapse of six months from the day of publication, i.e., on 15th June 1962, and gives effect to the rules of all international maritime conventions ratified by Poland, inter alia the Hague Rules.

The Polish Maritime Code Act 1961 regulates the question of the carrier's liability and its financial limitation by direct reference to the provisions of the relevant international convention ratified by Poland. In particular it refers to calculation of limitation in Art. 158 of the Maritime Code Act 1961 as follows:

g. 1. In the carriage of cargo under a bill of lading in which the value of cargo has not been shown, indemnity for the loss of, or damage to, one package of cargo or another unit of cargo as by custom used in trade, may not exceed the amount calculated according to principles established on the subject in the international convention.

g. 2. To a foreign creditor whose state has established a

lower limit of carrier's liability than the limitation study is being carried out of the Hamburg Rules 1978 and the Multi-Modal Convention 1980.

Article 158 used to refer to the Hague Rules but, since the ratification by Poland of the Brussels Protocol 1968 on February 12th 1980, it refers to the Hague/Visby Rules.

Portugal adopted the Hague Rules into its national law in February 1950. There are no plans to adopt the Hague/Visby Rules, the Hamburg Rules or the Multimodal Convention.

South Africa adopted the Hague Rules into its law by the Merchant Shipping Act No. 57 of 1951 C. VIII and the act came into force on January 1, 1960. The Hague/Visby Rules are being considered and a draft bill prepared but adoption is not likely within a year. The Hamburg Rules and the Multimodal Convention will not receive attention in the near future, if at all.

Spain adopted the Hague Rules in 1930 but they only came into force in 1950. The Hague/Visby Rules and the Hamburg Rules are being studied, and Spain will follow the future lead of a substantial group of countries if such a lead should appear.

Sweden adopted the Hague Rules in 1936 and the Hague/Visby Rules in 1976. In general, it can be said that the Hague/Visby Rules apply to all carriage except between countries which have only adopted the Hague Rules, when the latter apply. In particular the Hague/Visby Rules will apply in the following

cases:

- 1) Inter-Scandinavian transportation based on charterparties or bills of lading.
- 2) Transports based on bills of lading issued in Sweden, Denmark or Norway.
- 3) Bill of Lading transports to a Scanadinavian country from a country which has not adopted the Hague Rules.
- 4) Whenever the bill of lading contains a Paramount Clause to the effect that the Hague/Visby Rules apply.
- 5) Whenever the bill of lading is issued in a country which has neither adopted the Hague Rules nor the Hague/Visby Rules, but the transport is effected from a country which has adopted the Hague/Visby Rules.

By statute 1978:140, issued on March 30, 1978 the Government issued stipulations regarding conversion of Poincare francs into SDRs of limitation amounts as stated in the Maritime Code and other similar legislation. It follows that Poincaré francs 10,000 equals 666.67 SDRs and Poincaré francs 30 equals 2 SDRs. The latest value of 1 SDR published on June 26, 1981 is 5.82273 Swedish crowns. The per package limitation is therefore 3,885 Swedish crowns, or about US \$777, and the per kilo limitation is 11.65 Swedish crowns or about US \$2.33.

According to the official terms of reference issued by the Department of Justice to the Maritime Code Commission which at present is reconsidering Chapter 5 of the Swedish Maritime Code, the Commission has been asked to study the effect of and give recommendations on the adoption of the Hamburg Rules. The Commission has just started its work and it is impossible to state now what the recommendations will be and when they will

be completed and published. The terms of reference issued by the Department of Justice to the Maritime Code Commission do not include a request for the Commission to consider an adoption or ratification of the Multimodal Convention.

Switzerland adopted the Hague Rules in 1954 and the Hague/Visby Rules in 1975. There is little likelihood of adopting the Hamburg Rules or the Multimodal Convention unless they are ratified by the majority of the world's seafaring nations.

U.K. The Hague Rules were adopted in 1924 by the United Kingdom, (the first nation to do so), and were amended by the Hague/Visby Rules in 1977. The United Kingdom has also converted to SDR by virtue of the Merchant Shipping Act 1981 but the Act is not yet in force. It is unlikely that the United Kingdom will adopt either the Hamburg Rules or the Multimodal Convention.

U.S.A. adopted the Hague Rules in 1936, being 46 U.S. Code 1300 et seq. Ratification of the Hamburg Rules or the Multimodal Convention seems unlikely but ratification of the Hague/Visby Rules is possible.

U.S.S.R. The Soviet Union did not accede to the 1924 Hague Rules Convention, nevertheless the main principles were put into the Merchant Shipping Code of 1929.

Venezuela has not adopted the Hague Rules and is not studying the Hague/Visby Rules, the Hamburg Rules or the Multimodal



Convention. As in many South American countries, it is standard practice for carriers to incorporate the Hague Rules into bills of lading with £100 or U.S. \$500 limitation per package.

Yugoslavia ratified the Hague Rules in 1959 and incorporated them into the local law. The Hague/Visby Rules were neither ratified nor signed but were incorporated into the Law on Maritime and Internal Navigation in 1977, with the exception of the per package limitation. The Hamburg Rules and the Multimodal Convention are being studied.



## SELECTED BIBLIOGRAPHY

Asser, T.M.C., "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis" (1975), 5 J. of Maritime L. and Commerce 645.

Astle, W.E., Shipping and the Law (London: Fairplay Publications, 1980), 260 p.

Cadwallader, F.J.J., "Care of Cargo Under the Hague Rules" (1967), 20 Current Legal Problems 13.

Carver's Carriage By Sea, II Vol. (12th ed.) (London: Stevens and Sons, 1971), 1357 p.

DeGurse, John L., "The 'Container Clause' in Article 4(5) of the 1968 Protocol to the Hague Rules" (1970)), 2 J. of Maritime L. and Commerce 131.

Diamond, Anthony, "The Hague-Visby Rules" [1978] Lloyd's Maritime and Commercial L.Q. 225.

Hellawell, Robert, "Allocation of Risk Between Cargo Owner and Carrier" (1979), 27 American J. of Comparative L. 357.

Maher, John A., Jr., and Joan, Maher, "Marine Transport Cargo Risks and the Hamburg Rules -- Rationalization or Imagery?" (1980), 84 Dickinson Law Rev. 183.

Mankabady, Samir, "Comments on the Hamburg Rules" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston: Sijthoff and Leyden, 1978), pp. 27-115.

---ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston: Sijthoff and Leyden, 1978), 358 p.

Murray, D.E., "The Hamburg Rules: A Comparative Analysis" (1980), 12 Lawyer of the Americas 59.

Payne and Ivamy's Carriage of Goods by Sea (11th ed.) (London: Butterworth and Co. (Publishers) Ltd., 1979), 332 p.

Ramberg, Jan, "The Vanishing Bill of Lading and the 'Hamburg Rules Carrier'" (1979), 27 American J. of Comparative Law 391.

Scrutton on Charter Parties and Bills of Lading (18th ed.) (London: Sweet and Maxwell, 1974), 624 p.

Selvig, Erling, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981), 12 J. of Maritime L. and Commerce 299.

--- "The Paramount Clause" (1961), 10 American J. of Comparative L. 205.

- "Through-Carriage and On-Carriage of Goods by Sea" (1979), 27 American J. of Comparative L. 369.

--- "Unit Limitation and Alternative Types of Limitation of Carrier's Liability" in Kurt Grönfors, ed., Six Lectures on the Hague Rules (Göteborg: Akademiförlaget - Gumpert's, 1967), pp. 105-125.

Shah, M.J., "The Revision of the Hague Rules on Bills of Lading Within the UN System - Key Issues" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston: Sijthoff and Leyden, 1978), pp. 1-26.

Silard, Stephen A., "Carriage of the SDR by Sea: the Unit of Account of the Hamburg Rules" (1978), 10 J. of Maritime L. and Commerce 13.

Sweeney, Joseph C., "Article 6 of the Hamburg Rules" in S. Mankabady, ed., The Hamburg Rules on the Carriage of Goods by Sea (Boston: Sijthoff and Leyden, 1978), pp. 151-165.

--- "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)" (1975), 7 J. of Maritime L. and Commerce 69.

--- "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part Two)" (1975), 7 J. of Maritime L. and Commerce 327.

--- "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)" (1975), 7 J. of Maritime L. and Commerce 487.

--- "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)" (1976), 7 J. of Maritime L. and Commerce 615.

--- "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)" (1977), 8 J. of Maritime L. and Commerce 167.

Tetley, William, "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978), 9 J. of Maritime L. and Commerce 251.

--- "The Hamburg Rules: A Commentary" [1979] Lloyd's Maritime and Commercial L.Q. 1.

--- Marine Cargo Claims (2nd ed.) (Toronto: Butterworths and Co. (Canada) Ltd., 1978), 664 p.

United Nations Conference on the Carriage of Goods by Sea: Official Records, U.N. Doc. A/Conf.89/14 (New York, 1981). 408 p.

United Nations Commission on International Trade Law. "Responsibility of Ocean Carriers for Cargo - Bills of Lading: Report of the Secretary-General", U.N. Doc.A/CN.9/63/Add.1 in UNCITRAL Yearbook, Vol. III (New York, 1972), pp. 263-305.

--- "Report of the Secretary-General, second report on responsibility of ocean carriers for cargo: bills of lading", U.N. Doc.A/CN.9/76/Add.1 in UNCITRAL Yearbook, Vol. IV (New York, 1973), pp. 159-200.

--- "Report of the Secretary-General; third report on responsibility of ocean carriers for cargo: bills of lading", U.N. Doc.A/CN.9/88/Add.1 in UNCITRAL Yearbook, Vol. V, (New York, 1974), pp. 140-165.



--- "Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading", U.N. Doc.A/CN.9/96/Add.1 in UNCITRAL Yearbook, Vol. VI (New York, 1975), pp. 203-222.

United Nations Conference on Trade and Development. "Bills of Lading - Report of the Secretariat of UNCTAD", U.N. Doc.TD/B/C.4/ISL/6/Rev.1, 1971.





